(11)

No. 00-1514-CSX Title: Lance Raygor and James Goodchild, Petitioners
v.
Regents of the University of Minnesota

Docketed: April 2, 2001 Court: Supreme Court of Minnesota

Entry	Date	Proceedings and Orders
	Mar 30 2001	Petition for writ of certiorari filed. (Response due May 2, 2001)
	Apr 5 2001	Certificate issued to the Attorney General certifying that this case draws into question the constitutionality of an Act of Congress under 28 U.S.C. 2403(a).
	May 2 2001	Brief of respondent Regents of the University of Minnesota in opposition filed.
	May 15 2001	DISTRIBUTED for Conference of May 31, 2001
	May 15 2001	Reply brief of petitioners Lance Raygor and James Goodchild filed.
	Jun 4 2001	Petition GRANTED. SET FOR ARGUMENT November 26, 2001. **********
	Jun 25 2001	Order extending time to file the joint appendix and petitioners' brief on the merits to and including August 9,2001.
	Aug 7 2001	Order further extending time to file petitioners' brief on the merits to and including August 13, 2001.
	Aug 8 2001	Joint appendix filed.
	Aug 13 2001	Brief of petitioners Lance Raygor, et al. filed.
	Aug 27 2001	Order extending time to file respondent's brief on the merits to and including September 28, 2001.
	Sep 5 2001	Motion of the United States to intervene filed.
	Sep 12 2001	Motion DISTRIBUTED. October 5, 2001 (Page 4)
	Sep 14 2001	Order extending time to file respondent's brief on the merits to and including September 28, 2001.
	Sep 26 2001	CIRCULATED.
	Sep 27 2001	Order further extending time to file respondent's brief on the merits to and including October 9, 2001.
	Oct 5 2001	Brief amici curiae of Maryland, et al. filed.
	Oct 9 2001	Motion of the United States to intervene GRANTED.
	Oct 9 2001	Brief of respondent Regents of the University of Minnesota filed.
	Oct 9 2001	Brief amici curiae of National Conference of State Legislatures, et al. filed.
	Oct 9 2001	Brief amicus curiae of respondent United States filed.
	Oct 18 2001	Motion of the Solicitor General for divided argument filed.
	Oct 29 2001	Motion of the Solicitor General for divided argument GRANTED.
	Nov 8 2001	Reply brief of petitioners Lance Raygor, et al. (TBP) filed.
	Nov 26 2001	ARGUED.
	Nov 28 2001	Record filed.

1PP

Supreme Court, U.S.
FILED

001514 MAR 30 2001

OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States

Lance Raygor and James Goodchild,
Petitioners,

v.

Regents of the University of Minnesota,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Is the tolling provision of 28 U.S.C. §1367(d), insofar as it applies to a state defendant, unconstitutional?

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CONSTITUTIONAL PROVISIONS

Amendment XI 1

Petitioners Lance Raygor and James Goodchild, respectfully petition for a writ of certiorari to review the decision of the Minnesota Supreme Court.

OPINIONS BELOW

The Minnesota Supreme Court's opinion in *Regents of the University of Minnesota v. Lance Raygor and James Goodchild* was filed January 4, 2001 and is reported at 620 N.W.2d 680 (Minn.2001). Appendix ["App"] A1-A15. The opinion of the Minnesota Court of Appeals in *Raygor v. University of Minnesota* was filed January 11, 2000 and is reported at 604 N.W.2d 121 (Minn.Ct.App. 2000). App A16-A26. The decision of the Hennepin County District Court of Minnesota was entered on June 29, 1999 and was unreported. App A27-A38. The decision of the United States District for the District of Minnesota was filed on July 11, 1997 and was unreported. App A39.

JURISDICTION

The Minnesota Supreme Court filed its decision on January 4, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States - Amendment XI

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to any suit in law or equity, commenced or prosecuted against one of the

United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Supplemental Jurisdiction - 28 U.S.C. §1367

Section 1367 provides in pertinent part:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal Statute, in any civil action of which the district courts have original jurisdiction, the district court shall have supplemental jurisdiction over all claims that are so related to claims within the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

***

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if-

***

(3) The district court has dismissed all claims over which it has original jurisdiction.

***

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

STATEMENT UNDER RULE 29.4(b)

Since the proceeding draws into question the constitutionality of 28 U.S.C. § 1367(d), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof, is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

STATEMENT OF THE CASE[1]

On or about August 23, 1995, Petitioners filed charges of discrimination with the Minnesota Department of Human Rights ("MDHR"). App A 43-A44. Both Petitioners alleged age discrimination in violation of the Minnesota Human Rights Act ("MHRA"), Minn.Stat. §363.01, *et seq.* arising out of Respondent's adverse actions taken against them on and after December, 1994. App A45. On July 17, 1996, the MDHR dismissed Petitioners' charges of discrimination. The MDHR issued letters of dismissal to Petitioners that outlined their rights to bring civil actions under the MHRA within 45 days of receipt of such letter. App. A46.

On or about August 30, 1996, Petitioners timely commenced separate actions against Respondent in the United States District Court for the District of Minnesota. App A41. Each Petitioner alleged one claim of age discrimination under the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621-634 and one

[1] The underlying facts of the present case are undisputed. The Minnesota Trial Court, Minnesota Court of Appeals and Minnesota Supreme Court relied upon the facts set forth in the Affidavit of Matthew E. Johnson, filed with Respondents' initial Motion for Summary Judgment before the Minnesota Trial Court. The Affidavit of Matthew E. Johnson is attached to Petitioners' Appendix at App A40-A55 (excluding Exhibits 2 and 4 as duplicative, 5, 6 and 8 as unnecessary).

claim of age discrimination under the MHRA. The two actions were subsequently consolidated. App A45-A49.

On June 3, 1997, after nine months of litigation, Respondent filed a motion to dismiss Petitioners' complaints pursuant to Federal Rule of Civil Procedure 12(b)(1). Respondent argued the federal district court lacked subject matter jurisdiction over Respondents' ADEA and MHRA claims on the grounds of Eleventh Amendment sovereign immunity. On July 11, 1997, the federal district court granted Respondent's Motion to Dismiss, without prejudice as to Petitioners' state claims. App A50.

Petitioners timely filed a joint notice of appeal from the federal district court's decision dismissing their ADEA claims. App A51-A52. The appeal was held in abeyance in the United States Court of Appeals for the Eighth Circuit pending this Court's decision in *Kimel v. Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998) *cert. granted*, 119 S.Ct. 902 (1999). After this Court issued its decision in *Kimel v. Florida Board of Regents*, 120 S.Ct. 631 (2000) Petitioners moved to withdraw their Eighth Circuit Appeal. Petitioners' motion was granted and the Eighth Circuit dismissed the appeal on January 26, 2000.

In the meantime, on or about July 31, 1997, even prior to filing their notice of appeal with the Eighth Circuit, Petitioners moved to preserve their state law age discrimination claims by filing a complaint under the MHRA in Hennepin County District Court. App A42. Initially, Petitioners' state law action was stayed pending the outcome of *Kimel*. Eventually, however, the stay was lifted only to allow Respondent to bring a Motion for Summary Judgment on statute of limitations grounds. App. A53-A55. Petitioners opposed the motion on the grounds that the state statute of limitations was tolled while the state claim was pending in federal district court pursuant to 28 U.S.C. §1367(d), and in

the alternative, the claim was equitably tolled.[2]

On May 28, 1999, the Hennepin County district court granted summary judgment concluding that:

> [T]he [Section 1367(d)] tolling provision does not apply here because the federal district court never had "original jurisdiction" over the controversy. The act of bringing a civil action does not confer jurisdiction. It does not matter that the text of the Eleventh Amendment does not contain the words "jurisdiction" or "original jurisdiction." The primary source of federal jurisdiction is the United States Constitution, and limiting the jurisdictional reach of the federal courts is precisely what the Eleventh Amendment does. Although the federal district court dismissed [Petitioners'] state law claims without prejudice, it dismissed the ADEA claim based upon an absence of subject matter jurisdiction.

App A31.

Petitioners appealed the Hennepin County District Court decision to the Minnesota Court of Appeals. On January 11, 2000, the Minnesota Court of Appeals reversed the Hennepin County District Court. The Court of Appeals held that assertion of the Eleventh Amendment defense did not vitiate or destroy a federal court's original jurisdiction over claims involving federal questions, or the court's supplemental jurisdiction over state law claims under 28 U.S.C. §1367, until is was successfully asserted by a state entity. App A17. Moreover, the Minnesota Court of Appeals held that the statute of limitations governing Petitioners' state age

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[2] Petitioners are not requesting review of the decision concerning equitable tolling. Thus, references to equitable tolling in any decision will not be discussed.

discrimination claim was tolled during the pendency of the federal district court action under 28 U.S.C. §1367(d). App A17.

On March 28, 2000, the Minnesota Supreme Court granted Respondent's Petition for Review of the Minnesota Court of Appeals' decision. On January 4, 2001, the Minnesota Supreme Court reversed the Minnesota Court of Appeals' decision. The Minnesota Supreme Court held that "*the application of Section 1367(d) is an unconstitutional infringement on state's sovereign immunity in violation of the Eleventh Amendment of the United States Constitution.*" App A2 (emphasis provided).

REASONS FOR GRANTING THE WRIT

This case presents two circumstances which ordinarily warrant review by this Court--a federal statute has been declared unconstitutional, and that declaration has been issued by a state court. Because the particular statute at issue, 28 U.S.C. § 1367, plays a pivotal role in coordinating proceedings in federal and state courts, a definitive decision by this Court regarding the constitutional question presented is of especial importance.

The tolling provision of section 1367(d) was enacted in 1990 to address a recurring and vexing problem in the relationship between federal and state courts. Where in a federal action involving federal question jurisdiction a plaintiff also raises supplemental (formerly "pendant") state claims, those state claims will usually be dismissed without prejudice if the federal claims are rejected prior to trial. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). During the pendency of that federal proceeding, the state statute of limitations will often have run, creating uncertainty as to whether the dismissed supplemental state claims could indeed be refiled in state court. Section 1367(d) resolved that issue

by providing that, following the federal court dismissal of such state claims, the plaintiff shall have at least 30 days to refile in state court.

This tolling provision serves the shared interests of the federal and state courts in the efficient administration of justice. "[I]t is generally desirable to toll the statute of limitations to permit refiling in the proper forum. Otherwise, parties could be manipulative in raising subject matter jurisdiction problems, and parties might feel compelled to file concurrent actions in state court if they suspect potential jurisdictional problems." *Stevens v. Arco Management*, 751 A. 2d 995, 1002 (D.C. Ct. App. 2000). This coordination of the interrelationship between the initial and later proceedings is of particular importance in our federal system.

> Tolling state statute of limitations periods serves two important functions to federal jurisdiction: (1) by guaranteeing a plaintiff that discretionary dismissal will not bar pendent state law claims, the statute assures the federal court that the entire case properly within its jurisdiction will be brought before it initially, rather than being brought in two forums, bifurcated; and (2) by providing some level of comfort to federal judges that discretionary dismissal will not subsequently bar a plaintiff's meritorious state law claims, the tolling provision serves the federal court case load and allows the judge to dismiss the claim without concern.

S. Scott, *Supplemental Jurisdiction Under 28 U.S.C. § 1367*, 72 Or. L. Rev. 695, 716 n. 145 (1993).

The court below has declared section 1367(d) unconstitutional as applied to state law claims against state defendants; under that court's reasoning, the statute would also be unconstitutional as applied to injunctive actions

against state officials. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). Certiorari is ordinarily granted by this Court "to review the exercise of the grave power of annulling an Act of Congress." *United States v. Gainey*, 380 U.S. 63, 65 (1965); *see United States v. Butler*, 297 U.S. 1 (1936). "Where the decision below holds a federal statute unconstitutional . . . certiorari is usually granted because of the obvious importance of the case." R. Stern & E. Gressman, Supreme Court Practice, 185 (1993).

Where a lower court has declared a federal statute unconstitutional, this Court regularly grants certiorari. *E.g., Legal Services Corporation v. Velazquez*, 121 S.Ct. 1043 (2001)(Legal Services Corporation Act held unconstitutional by lower court); *Mitchell v. Helms*, 530 U.S. 793 (2000)(chapter 2 of Education Consolidation and Impact Act of 1981 held unconstitutional by lower court); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000)(application of ADEA to state defendants held unconstitutional by lower court); *United States v. Morrison*, 529 U.S. 598 (2000)(Violence Against Women Act held unconstitutional by lower court); *Reno v. Condon*, 528 U.S. 141 (2000)(Driver's Privacy Protection Act held unconstitutional by lower court).

Review by this Court is particularly appropriate where the decision against the constitutionality of a federal statute has been issued by a state court. Such state court decisions "threate[n] the supremacy of federal law." *Key v. Doyle*, 434 U.S. 59, 67 (1978). Prior to 1988, section 1257 authorized an appeal as of right to this Court in such cases. In 1988 Congress this Court's appellate jurisdiction was largely replaced by review on certiorari, to avoid burdening the Court with the often unimportant or uncontroversial issues that until then had been the subject of appeals. *See* H.R. Rep. 100-660, pp. 27-28 (Letter signed by all members of this Court). But just as resolution of state law questions remains the ultimate

responsibility of state courts, a determination of the validity of federal statutes under the federal constitution lies at the very core of this Court's role in the national government. That is particularly true where, as here, the constitutional question is one which is not likely ever to arise in, or be addressed by, the federal courts of appeals. Because disputes about the validity of the section 1367(d) tolling provision cannot arise except in state court, this Court is the only federal court in a position to consider that question.

The dispute about the validity of section 1367(d) raises federalism issues with which this Court has long been uniquely concerned. The existence of federal and state law claims arising out of a single occurrence often raises delicate problems about the relationship between federal and state courts. In a long line of decisions this Court has constructed a careful balance between the sometimes competing interests of those court systems. *E.g. Younger v. Harris*, 401 U.S. 37 (1971), *Heck v. Humphrey*, 512 U.S. 477 (1994); *Felder v. Casey*, 487 U.S. 131 (1988). Section 1367(d), like the Anti-Injunction Act and the detailed new provisions regarding habeas corpus, is an important component of the effort of Congress to coordinate the litigation of interrelated federal and state claims. This element of judicial federalism should not be struck down without plenary review by this Court.

Where a federal statute has been declared invalid by a state court, review by this Court is particularly appropriate because the state court proceedings lack a critical safeguard ordinarily present where such a weighty constitutional issue is in dispute. Since 1937 Congress has required that *federal* courts formally notify the Attorney General whenever the validity of a federal statute is challenged in a proceeding to which the United States is not a party, and permit the United States to intervene to defend the law. 28 U.S.C. § 2403. That provision is implemented by Rule 44 of the Federal Rules of Appellate Procedure. But because it is quite uncommon for

disputes about the constitutionality of federal statutes to arise in state court, section 2403 does not apply in such cases. Here, the constitutionality of section 1367(d) was raised for the first time in the Minnesota Supreme Court. Thus, in the instant case the Attorney General had no notice or knowledge of the attack on the validity of section 1367(d), and played no role in the proceedings below.

Until the decision of the court below, the validity of section 1367(d) has been largely unquestioned. On the two other occasions when the constitutionality of section 1367(d) was challenged in state courts, the statute has been upheld. In *Estate of Fennell v. Stephenson*, 528 S.E. 2d 911 (N.C.App. 2000), the Attorney General of North Carolina attacked the validity of the section 1367(d) tolling provision. In sustaining section 1367, the North Carolina court reasoned:

> [W]e must determine whether Congress had authority under the United States Constitution to enact the statute. . . . When Congress enacts a statute creating a rule of practice in the federal courts and that statute conflicts with a state provision, the federal provision governs. . . . The tolling of a statute of limitations is a regulation of "the judicial process," and therefore, is procedural. Accordingly, Congress had the authority, pursuant to the Necessary and Proper Clause of the United States Constitution, to enact section 1367(d).

528 S.E. 2d at 915. Florida courts have rejected a similar attack on section 1367(d) by the Attorney General of that state. *Blinn v. Florida Department of Transportation*, ___So.2d___, 2000 WL 1880213, *4-*5 (Fla. App. 1 Dist.):

> [I]t is apparent that section 1367(d) falls within the realm of conflict preemption. Here, the state statute

> of limitations stands as an obstacle to the accomplishment of the Congressional purpose to permit federal litigants to pursue their dismissed state law claims in state court, provided they do so within the thirty-day period provided in section 1367(d).

But see id. at *5 (Joanos, J., dissenting)(section 1367(d) invalid as applied to state law claims against *any* defendant.)

The decision below is of great practical importance. Pendant claims against state defendants are common in federal civil litigation, and arise in a wide variety of circumstances, which include claims for due process violations[3], Eighth Amendment violations[4], 42 U.S.C. §1983[5], Title VII of the Civil Rights Act of 1964[6], Americans

[3] *See Loren v. State of New York*, 99 F.3d 402 (2d Cir. 1995); *Lansing Mercy Ambulance Service v. Tri-County Emergency Medical Control Authority, Inc.*, 893 F.Supp. 1337 (W.D.Mich. 1995); *Rossomando v. Board of Regents of University of Nebraska*, 2 F.Supp.2d 1223 (D.Neb. 1998).

[4] *See Sherwinski v. Peterson*, 98 F.3d 849 (5th Cir. 1996).

[5] *Cipolla v. Arizona Department of Economic Security*, 57 F.3d 1076 (9th Cir. 1995); *White v. State of Alaska*, 46 F.3d 1149 (9th Cir. 1995); *Ramirez v. Oklahoma Department of Mental Health*, 41 F.3d 584 (10th Cir. 1994); *Novosad v. State of New Mexico*, 145 F.3d 1346 (10th Cir. 1998); *Richardson v. Southern University*, 118 F.3d 450 (5th Cir. 1997); *Piecknick v. Commonwealth of Pennsylvania*, 36 F.3d 1250 (3d Cir. 1994); *Tennant v. State of Florida*, 111 F.Supp.2d 1326 (S.D. Fla. 2000); *Kenney v. Hawaii*, 109 F.Supp.2d 1271 (D.Haw. 2000); *Hiefner v. University of Tennessee*, 914 F.Supp. 1513 (E.D.Tenn. 1995); *Meachem v. Wing*, 77 F.Supp.2d 431 (S.D.NY. 1999); *Sims v. Kernan*, 29 F.Supp.2d 952 (N.D.Ind. 1998); *Lembach v. State of Indiana*, 987 F.Supp. 1095 (N.D.Ind. 1997); *Doran by and through Doran v. Condon*, 983 F.Supp. 886 (D.Neb. 1997);); *Walter v. Division of Revenue for State of Delaware*, 961 F.Supp. 97 (D.Del. 1997).

[6] *Snodderly v. Kansas*, 79 F.Supp.2d 1241 (D.Kan. 1999); *Ballou v. University of Kansas Medical Center*, 871 F.Supp. 1384 (D.Kan. 1994);

with Disabilities Act[7], Age Discrimination in Employment Act [8], Title IX[9], Religious Freedom Act[10], and the False Claims Act[11]. So long as the underlying federal claim is still pending, state defendants often do not object to the inclusion of these state law claims--even if an Eleventh Amendment objection might be available--because dismissal of those state claims by the federal court would simply lead the plaintiff to file a second, simultaneous state court action. In the absence of the section 1367(d) tolling provision, however, state defendants would have every reason to wait until the state court limitations period had expired, and then for the first time object to federal court consideration of the state claim.

The decision below will inexorably compel plaintiffs with both federal and state claims against state defendants to take the precaution of now commencing separate but concurrent civil actions in both federal and state court. Absent a definitive decision by this Court, no civil litigant can any longer be confident that he or she will be able to invoke

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Petitti v. Commission of Massachusetts Department of Mental Health, 859 F.Supp. 33 (D.Mass. 1993); *Clearwater v. Independent School District No. 166*, 231 F.3d 1122 (8th Cir. 2000).

[7] *Repp v. Oregon Health Sciences University*, 972 F.Supp. 546 (D.Or. 1997); *Cooley v. Mississippi Department of Transportation*, 96 F.Supp.2d 565 (S.D.Miss. 2000); *McCabe v. Independent School District No. 625*, 221 F.3d 1343 (8th Cir. 2000); *Autio v. AFSCME, Local 3139*, 140 F.3d 802 (8th Cir. 1998).

[8] *Butler v. New York State Department of Law*, 211 F.3d 739 (2d Cir. 2000).

[9] *Haley v. Virginia Com. University*, 948 F.Supp. 573 (E.D.Va. 1996); *Mercer v. Duke University*, 190 F.3d 643 (4th Cir. 1999).

[10] *Commack Self-Service Kosher Meats, Inc. v. State of New York*, 954 F.Supp. 65 (E.D.N.Y. 1997).

[11] *U.S. ex Rel. Moore v. University of Michigan*, 860 F.Supp. 400 (E.D.Mich. 1994).

section 1367(d) if a pendant claim is dismissed. That precaution, in turn, will often lead to vexing problems regarding *res judicata* and application of the *Rooker-Feldman* doctrine. At the least, confusion and a waste of judicial resources will invariably follow. Review by this Court is necessary to avoid these problems.

CONCLUSION

Based upon the foregoing, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: March 29, 2001

STATE OF MINNESOTA

IN SUPREME COURT

C1-99-1140

Court of Appeals — Blatz, C.J.
Took No Part, Page, J.

Regents of the University of Minnesota,

Appellant,

vs.

Filed: January 4, 2001
Office of Appellate Courts

Lance Raygor and James Goodchild,

Respondents.

SYLLABUS

1. The application of Section 1367(d) of Title 28 of the United States Code to toll the statute of limitations for filing a state law claim against an unconsenting state defendant is a denigration of the state's sovereign immunity barred by the Eleventh Amendment of the United States Constitution.

2. The district court did not abuse its discretion in finding that the statute of limitations does not toll on equitable principles where the parties knew that the Eleventh Amendment, if asserted by the University, would bar the federal district court from exercising supplemental jurisdiction over the state law claims, and the district court did not find any other grounds sufficient to invoke the limited remedy of equitable tolling.

Reversed.

Heard, considered, and decided by the court en banc.

OPINION

BLATZ, Chief Justice.

This case raises the issue of whether the tolling provision of the federal supplemental jurisdiction statute, codified at 28 U.S.C. § 1367(d) (1993), applies to toll the statute of limitations for Minnesota Human Rights Act claims against the Regents of the University of Minnesota during the time the state law claims were pending in federal court. Respondents Lance Raygor and James Goodchild brought this action against appellant Regents of the University of Minnesota (University) alleging age discrimination in violation of the Minnesota Human Rights Act (MHRA). The University brought a motion to dismiss, arguing that the statute of limitations for the MHRA claims had expired. In granting the motion, the state district court found that the statute of limitations for respondents' MHRA claims was not tolled under the federal supplemental jurisdiction statute and that equitable tolling did not apply to the facts in this case; therefore, the claims were not timely. The Minnesota Court of Appeals reversed, concluding that section 1367(d) did toll the state statute of limitations and that, in the alternative, the MHRA claims were equitably tolled during the pendency of the federal district court action. We reverse, holding that the application of section 1367(d) in this case is an unconstitutional infringement on state sovereign immunity in violation of the Eleventh Amendment of the United States Constitution, and that the district court did not abuse its discretion in concluding that equitable tolling does not apply.

In August 1995, respondents filed charges of discrimination with the Minnesota Department of Human Rights alleging age discrimination by the University of

Minnesota in certain employment decisions. The department dismissed the claims on July 17, 1996, and advised each respondent by letter that he could bring a civil action against the University in state district court within 45 days of receipt of the letter. Rather than filing in state court, respondents filed separate actions in the federal district court for the District of Minnesota on or about August 29, 1996, alleging violations of the federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1999), and the Minnesota Human Rights Act, Minn. Stat. ch. 363 (2000). In its answers, the University raised Eleventh Amendment immunity and lack of jurisdiction as affirmative defenses. The federal actions were consolidated. In June 1997, the University served and filed a motion to dismiss the complaints pursuant to Fed. R. Civ. P. 12(b)(1), arguing that the Eleventh Amendment bars suits in federal court against a state by citizens of that or another state. The federal district court granted the motion by order filed July 14, 1997, dismissing the claims without prejudice. Respondents appealed the federal district court's decision to the Eighth Circuit Court of Appeals. The appeal was stayed. On January 11, 2000, the United States Supreme Court held in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), that the Eleventh Amendment is a valid defense to an Age Discrimination in Employment Act claim against a state. After *Kimel* was decided, respondents moved to withdraw the appeal, and the Eighth Circuit Court of Appeals dismissed the appeal.

Meanwhile, on August 1, 1997, respondents commenced this action in state district court alleging age discrimination under the MHRA. The action was stayed while the federal appeal was still pending; however, the stay was lifted on December 31, 1998, for the limited purpose of deciding the University's summary judgment motion. In moving for summary judgment, the University claimed that the action was barred by the state statute of limitations because respondents failed to file their claims in state district court

within 45 days of receiving notice that the Minnesota Human Rights Department had dismissed the claims. *See* Minn. Stat. §§ 363.06, subd. 3, 363.14, subd. 1(a)(1) (2000). The state district court granted the motion,[1] concluding that the limitations period for the state action was not tolled while the federal action was pending and that equitable tolling did not apply to extend the limitations period.

Respondents sought review of the state district court's judgment in the court of appeals. The court of appeals reversed, concluding that 28 U.S.C. § 1367(d) tolled the statute of limitations for respondents' MHRA claims during the pendency of the federal district court action. *See Raygor v. University of Minn.*, 604 N.W.2d 128, 133 (Minn. App. 2000). Alternatively, the court of appeals concluded that respondents' claims were equitably tolled while their federal district court action was pending. *See id.* at 134.

I.

This case presents us with the question of whether the tolling provision of the federal supplemental jurisdiction statute should apply to toll the statute of limitations for a state law claim against a state defendant, in light of the immunity afforded the state by the Eleventh Amendment. In consideration of this issue, we first review the supplemental jurisdiction statute and the Eleventh Amendment.

In *United Mine Workers v. Gibbs*, the United States Supreme Court recognized the common law doctrine of pendent jurisdiction, which permits a federal court to hear state law claims over which the federal court would not otherwise have jurisdiction when the state law claims are joined with a related federal claim. 383 U.S. 715, 725 (1966).

[1] The University brought the motion as a motion for summary judgment; however, the state district court's May 28, 1999, order and memorandum granted the motion as a motion to dismiss.

To be related for purposes of pendent jurisdiction, the claims "must derive from a common nucleus of operative fact." *Id.* Congress codified the doctrine of pendent jurisdiction at 28 U.S.C. § 1367, known as the supplemental jurisdiction statute. Subdivision (a) provides:

> Except as provided in subsections (b) [dealing with diversity jurisdiction] and (c) [discretionary dismissal of supplemental claims] or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. § 1367(a) (1993).

At issue in this case is subdivision (d) of section 1367, which tolls the state statute of limitations for claims asserted under supplemental jurisdiction while the claims are pending in federal court. Subdivision (d) also assures a 30-day period in which to bring a state action after a supplemental claim is dismissed by the federal court:

> The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

28 U.S.C. § 1367(d). By its plain language, section 1367(d) applies to "any claim" asserted under section 1367(a); however, the University argues that this federal statute cannot trump the protections afforded the University by the Eleventh Amendment.

Critical to our analysis of section 1367(d)'s effect in this case is an understanding of the Eleventh Amendment. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Notwithstanding this express language, the Eleventh Amendment has long been interpreted to also prohibit citizens from pursuing claims against their own state in federal court. *See Hans v. Louisiana*, 134 U.S. 1, 15 (1890). The protections of the Eleventh Amendment exist unless the state has unequivocally consented to suit in federal court, or Congress has unequivocally abrogated state immunity in order to effectuate the provisions of the Fourteenth Amendment. *See Seminole Tribe v. Florida*, 517 U.S. 44, 54-55 (1996); *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). Because there is no dispute that the University is an "arm" of the State of Minnesota, the University is entitled to the protections of the Eleventh Amendment in a suit brought by citizens of Minnesota in a federal court. *See Treleven v. University of Minn.*, 73 F.3d 816, 819 (8th Cir. 1996).

Prior to the enactment of section 1367, the United States Supreme Court applied Eleventh Amendment immunity to claims brought in federal court under common law pendent jurisdiction. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). In *Pennhurst*, the Court concluded that "neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment." 465 U.S. at 121. Therefore, under the reasoning in *Pennhurst*, the

federal district court could not exercise jurisdiction over the MHRA claims once the Eleventh Amendment was asserted by the University. *See Cooper v. St. Cloud State Univ.*, 226 F.3d 964, 968 (8th Cir. 2000); *Mayer v. University of Minn.*, 940 F. Supp. 1474, 1476 (D. Minn. 1996). In fact, respondents did not dispute the University's motion in federal court to dismiss the MHRA claims, and the consolidated MHRA claims were dismissed.

Because respondents then filed the MHRA claim against the University in state district court after the 45-day statute of limitations set forth in Minn. Stat. § 363.14, subd. 1(a)(1) (2000) expired, we must decide if section 1367(d) can be applied to toll the statute of limitations on claims dismissed under an assertion of Eleventh Amendment immunity in federal court. The University argues that the Eleventh Amendment is an automatic jurisdictional bar preventing original and supplemental jurisdiction from ever attaching, thus preventing the application of tolling under section 1367(d). Respondents argue that the Eleventh Amendment is a waivable affirmative defense that permits supplemental jurisdiction to attach until immunity is successfully asserted, thereby allowing the statute of limitations to be tolled under section 1367(d) until the case is dismissed from federal court.

Underlying the parties' positions is a basic disagreement as to how the Eleventh Amendment operates as a jurisdictional defense. While we do not solve this dispute, we recognize that the Eleventh Amendment is a jurisdictional defense, but that it has unique characteristics not always shared with other limitations on federal jurisdiction. Indeed, the United States Supreme Court has long recognized Eleventh Amendment immunity as a limit on the reach of the federal judiciary. *See, e.g., Seminole Tribe*, 517 U.S. at 72-73 ("The Eleventh Amendment restricts the judicial power under Article III."); *Pennhurst*, 465 U.S. at 98 ("[T]he fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III * * *."); *Missouri v. Fiske*, 290 U.S. 18,

25 (1933) ("The Eleventh Amendment is an explicit limitation of the judicial power of the United States.").

Nonetheless, while recognizing the Eleventh Amendment as a constraint on the exercise of federal court jurisdiction, the Court has also consistently acknowledged two characteristics that distinguish Eleventh Amendment immunity from typical subject-matter jurisdiction limitations.[2] First, a party entitled to Eleventh Amendment protection may waive immunity and submit to federal court jurisdiction. *See Clark v. Barnard*, 108 U.S. 436, 447 (1883) (stating that Eleventh Amendment immunity is a "personal privilege" that a state may waive). This differs from typical jurisdictional requirements, such as diversity jurisdiction, where the parties cannot confer jurisdiction by waiver or consent. *See Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702 (1982) ("[N]o action of the parties can confer subject-matter jurisdiction upon a federal court."). Second, a federal court is not required to raise an Eleventh Amendment defense *sua sponte*, whereas jurisdictional defects in general must be raised by the court if not addressed by the parties. *Compare Patsy v. Board of Regents*, 457 U.S. 496, 515 n.19 (1982) ("[B]ecause the State may, under certain circumstances, waive this [Eleventh Amendment] defense, we have never held that it is jurisdictional in the sense that it must be raised and decided by this Court on its own motion"), *with Insurance Corp. of Ireland*, 456 U.S. at 702 ("[A] court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion. ").

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[2] Dicta in *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 391 (1998), indicates that whether Eleventh Amendment immunity is a matter of subject matter jurisdiction is "a question [the Court has] not decided." More recently, however, the Court noted in *Kimel v. Florida Bd. of Regents* that "for over a century now, [the United States Supreme Court has] made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States." 528 U.S. at 73.

Given these distinct characteristics, the court of appeals determined that when a state law claim asserted in federal court is subject to an Eleventh Amendment immunity defense, the federal court has jurisdiction over that claim until the state defendant successfully asserts the Eleventh Amendment and the claim is dismissed.[3] The University, on the other hand, argues that the Eleventh Amendment automatically bars federal court jurisdiction until immunity is waived. We need not answer this quintessentially federal question because, as explained below, our holding is not based on whether jurisdiction temporarily attaches. Rather, we must simply determine whether the Eleventh Amendment's proscription on Congress' power to extend federal judicial power over an unconsenting state allows Congress to impose tolling of a state statute of limitations for a claim against an unconsenting state defendant in state court. We conclude that application of the tolling provision violates the Eleventh Amendment, because the Eleventh Amendment prohibits Congress from extending the state's liability to suit in state court via the state's unconsented presence in federal court. Specifically, the Eleventh Amendment does not permit Congress to affect the liability of the University as to a state

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[3] In support of the proposition that the Eleventh Amendment did not destroy original jurisdiction until it was successfully asserted by the University, the court of appeals also relied on the United States Supreme Court's statement in *Schacht*, that "[t]he Eleventh Amendment * * * does not automatically destroy original jurisdiction." 524 U.S. at 389. This reliance is misplaced because the issue before the Court in *Schacht* was whether the presence of a single claim barred by the Eleventh Amendment prohibited the federal court from exercising removal jurisdiction over any of the other claims. *See Schacht*, 524 U.S. at 385-86. Thus, *Schacht* informs us that when a cause of action consists of several claims with independent sources of federal jurisdiction, and one of those claims is barred by the Eleventh Amendment, the original jurisdiction is not destroyed for the remaining claims not subject to the Eleventh Amendment. *See Schacht*, 524 U.S. at 391. *Schacht* does not tell us whether the federal district court has jurisdiction over a claim barred by the Eleventh Amendment before sovereign immunity is asserted.

law claim in state court when the University did not consent to federal jurisdiction.

II.

The parties do not dispute that the Eleventh Amendment will bar a federal action against a state unless Congress has unequivocally abrogated the states' sovereign immunity in enacting legislation pursuant to section 5 of the Fourteenth Amendment or the state has waived its sovereign immunity. This principle is supported by Supreme Court case law. *See Seminole Tribe*, 517 U.S. at 55. Section 5 is an affirmative grant of power giving Congress the authority to "enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment. U.S. Const. amend. XIV, § 5. Here, neither party contends that section 1367 effectuates a valid abrogation of state sovereign immunity.

Absent valid abrogation of the University's sovereign immunity through section 1367, the federal court could not exercise jurisdiction over the supplemental claims against the University without its consent. The University did not consent; instead, it asserted Eleventh Amendment immunity as an affirmative defense in its answer in the federal district court, and later as a basis for the motion to dismiss in federal court. As a result, the action was dismissed from the federal court system and the MHRA claims were subsequently filed in state district court.

The tentacles of section 1367 were not completely severed when the federal district court dismissed the supplemental claims, however. Allowing tolling under section 1367(d) would alter the University's position in state court by requiring the University to answer a claim in state court that would otherwise be barred by the state statute of limitations. Because Congress cannot, absent valid abrogation of sovereign immunity, extend federal judicial power against unconsenting states, it follows that Congress

cannot impose a penalty on a state defendant for being named, without its consent, as a defendant in federal court. To allow such a result would, in effect, penalize the unconsenting state defendant for the other party's failed attempt to sue the state in federal court. The Eleventh Amendment does not permit Congress to extend this federal judicial power over the states.

The constraints on federal power imposed by sovereign immunity are evident in decisions of the United States Supreme Court upholding assertions of sovereign immunity in contexts that fall outside the strict language of the Eleventh Amendment. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.2 (1985) ("The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself."). This expansive scope of sovereign immunity is apparent in *Alden v. Maine*, 527 U.S. 706, 711-12 (1999), in which a group of probation officers filed suit in federal district court against their employer, the State of Maine, alleging violations of the overtime provisions of the federal Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1994). After dismissal from the federal courts, the plaintiffs filed the same action in state court, as provided by the federal statute. *See Alden*, 527 U.S. at 712. The state court also dismissed the action on the basis of sovereign immunity. *See id.* Concluding that a federal statutory provision that purports to allow private actions against unconsenting states in their own courts is unconstitutional, the Court held that "the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by * * * legislation." *Id.* at 754. Therefore, absent consent, Congress could not make the State of Maine subject to suit in state court for violations of the federal Fair Labor Standards Act. *See Alden*, 527 U.S. at 754.

This case differs from *Alden* in that the contested claims here are not federal claims, but rather state law claims from which the University has no immunity in state court. *See* Minn. Stat. § 363.01, subds. 17, 28 (2000) (defining "employer" under the MHRA to include the state, its departments, agencies, and political subdivisions). However, we read *Alden* to require that the University's waiver of immunity be limited to the parameters set forth by state statute. 527 U.S. at 749 ("[T]he immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself."). Thus, as defined by state law, the University's exposure to MHRA suit in this case existed only for the 45-day period following respondents' notification of dismissal of charges by the Department of Human Rights. *See* Minn. Stat. § 363.14, subd. 1(a)(1).

Furthermore, the state's waiver of sovereign immunity for MHRA claims timely filed in state court does not diminish the University's Eleventh Amendment protections from *federal* judicial power with respect to MHRA claims. The University's "constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst*, 465 U.S. at 99. Therefore, the general waiver of immunity in state court is not a waiver of the University's Eleventh Amendment immunity in the federal courts. *See Pennhurst*, 465 U.S. at 99 n.9.

Through the federal tolling provision, respondents seek to expand the University's liability exposure by extending the time in which the MHRA claims can be filed in state court. Here, as in *Alden*, Congress has enacted legislation impacting an unconsenting state defendant's liability for suit in that state's own courts. The Eleventh Amendment does not allow this exercise of federal power over an unconsenting state. As the Court stated in *Alden*,

> Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States.

527 U.S. 758. Congress, through application of section 1367(d), does not treat the University as a sovereign entity. Based on the principles articulated in *Pennhurst* and *Alden*, we conclude that application of section 1367(d) to toll the statute of limitations applicable to state law claims against an unconsenting state defendant first filed in federal court but then dismissed and brought in state court is an impermissible denigration of the University's Eleventh Amendment immunity.

We also reject respondents' argument that tolling is required in the interests of judicial economy. Judicial economy and efficiency were central principles behind the Judicial Improvements Act of 1990, which included section 1367. *See* 136 Cong. Rec. S17580 (1990). However, in *Pennhurst*, the United States Supreme Court rejected the judicial economy argument in the context of applying the Eleventh Amendment to pendent state claims, concluding that "such considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State." 465 U.S. at 123; *see also Fiske*, 290 U.S. at 25-26 ("Considerations of convenience open no avenue of escape from the [Eleventh Amendment's] restriction."). Similarly, we conclude that policy considerations cannot override Eleventh Amendment limitations on the authority of Congress to affect claims against the University in state court.

Extension of the University's exposure to suit in state court because a claim barred by the Eleventh Amendment has been filed against it in federal court is an infringement on the University's Eleventh Amendment immunity. Accordingly, we hold that section 1367(d) does not toll the state statute of limitations on the MHRA claims against the University.

III.

Even though section 1367(d) does not apply to toll the statute of limitations, the court of appeals held, in the alternative, that the limitations period should be tolled under equitable principles. It is within the discretion of the district court to grant or deny equitable relief. *See Nadeau v. County of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979). The district court's decision will be reversed only upon a clear showing that such discretion has been abused. *See id.*

Respondents argue that equitable tolling is warranted because they elected to pursue their MHRA claims in federal court with the good faith belief that the federal court had jurisdiction over the claims. The district court acknowledged that at the time the federal actions were filed, there was some confusion surrounding the question of whether Eleventh Amendment immunity should apply to the federal Age Discrimination in Employment Act claim. The district court found, however, that under *Pennhurst* it was clear the federal district court could not exercise jurisdiction over the supplemental MHRA claims. Noting the limited scope of the equitable tolling remedy and failing to find any other grounds sufficient to invoke the remedy, the district court found that the respondents' election to pursue their MHRA claims in federal court did not justify equitable tolling.

In reversing the district court, the court of appeals did not discuss the district court's analysis or provide any reason to conclude that the district court abused its discretion. Our careful review of the record compels the conclusion that the

district court did not abuse its discretion when it denied respondents the remedy of equitable tolling.

Because section 1367 does not toll the state statute of limitations for the MHRA claim against the University and because the district court acted within its discretion in deciding that equitable tolling did not apply, we reverse the court of appeals and reinstate the district court's judgment that the claims were not timely filed.

Reversed.

PAGE, J., took no part in the consideration or decision of this case.

STATE OF MINNESOTA
IN COURT OF APPEALS
C1-99-1140

Lance Raygor, et al.,
Appellants,

vs.

University of Minnesota,
a Minnesota State University,
Respondent.

Filed January 11, 2000
Reversed
Klaphake, Judge

Hennepin County District Court
File No. EM97013937

Howard Bolter, Borkon, Ramstead, Mariani & Letourneau, Ltd., 485 Northstar East, 608 Second Ave. S., Minneapolis, MN 55402-1959 (for appellants)

Andrew D. Parker, Matthew E. Johnson, Smith Parker, P.L.L.P., 808 Colwell Building, 123 North Third St., Minneapolis, MN 55401 (for respondent)

Considered and decided by Randall, Presiding Judge, Klaphake, Judge, and Holtan, Judge.*

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* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

SYLLABUS

1. The assertion of an Eleventh Amendment defense does not vitiate or destroy a federal district court's original jurisdiction over claims involving federal questions or the court's mandatory, supplemental jurisdiction over state law claims under 28 U.S.C. § 1367 (1994).

2. Under 28 U.S.C. § 1367(d) (1994), the limitations period for asserting claims under the Minnesota Human Rights Act is tolled during the pendency of a federal district court action alleging similar claims and claims under the Age Discrimination in Employment Act (ADEA), even though the federal district court action was ultimately dismissed on Eleventh Amendment grounds.

3. When the defendant is not prejudiced and when the plaintiff's decision to file an action including both federal and state claims first in federal district court was legally sound, the limitation period under state law may be equitably tolled pending a decision in federal district court.

OPINION

KLAPHAKE, Judge

Appellants Lance Raygor and James Goodchild brought this action against their employer, respondent University of Minnesota (University), alleging age discrimination in violation of the Minnesota Human Rights Act (MHRA), Minn. Stat. § 363.01-.20 (1996). The University moved to dismiss, arguing that the MHRA's 45-day statute of limitations had lapsed and was not tolled by 28 U.S.C. § 1367 (d) (1994). The district court agreed and granted the University's motion. We reverse.

FACTS

In August 1995, appellants filed separate charges with the Minnesota Department of Human Rights (MDHR) alleging age discrimination against the University. By letters dated July 17, 1996, the MDHR dismissed the charges and notified appellants that they had 45 days in which to file civil suits in state district court. *See* Minn. Stat. § 363.14, subd. 1 (1996) (person may bring civil action in state district court within 45 days after receipt of notice that commissioner has dismissed charge).

On August 30, 1996, appellants sued the University in federal district court. They each alleged one claim under the Age Discrimination in Employment Act of 1974 (ADEA) and one claim under the MHRA. Their actions were consolidated.

Nine months later, the University moved to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). The University argued that the court lacked jurisdiction over the ADEA and the MHRA claims because the Eleventh Amendment bars suits in federal court against a state by citizens of that or another state. The federal district court granted the University's motion and dismissed appellants' claims without prejudice.

Appellants challenged the federal district court's decision in the Eighth Circuit Court of Appeals. That appeal has been stayed pending a decision by the United States Supreme Court in another case involving the issue of whether an ADEA claim against a state is barred by the Eleventh Amendment. *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (1999).

Twenty days after the federal district court dismissed their action, appellants brought this action in state district court alleging age discrimination under the MHRA. This action was stayed for several months pending a decision in the federal appeal. The state district court lifted the stay,

however, to allow the University to bring this motion to dismiss on statute of limitations grounds.

ISSUES

1. Did the district court err in concluding that the limitation period for appellants' state action was not tolled while appellants' federal action was pending?

2. Did the district court abuse its discretion by rejecting appellants' claim that the limitation period should be equitably tolled?

ANALYSIS

I.

Summary judgment is appropriate where no genuine issues of material fact exist and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. When the court examines documents and evidence in addition to the pleadings, a motion to dismiss under Minn. R. Civ. P. 12.02 becomes one for summary judgment. Minn. R. Civ. P. 12.03. Issues involving jurisdiction and application of statutes of limitations require statutory interpretation, which is a question of law that this court reviews de novo. *See Boubelik v. Liberty State Bank*, 553 N.W.2d 393, 402 (Minn. 1996).

This case involves interpretation of the federal "Supplemental Jurisdiction" statute, which provides in pertinent part:

> (a) Except as provided in subsections (b) [which discusses diversity jurisdiction] and (c) [which allows court to decline to exercise supplemental jurisdiction in certain circumstances, such as when a state law claim raises a novel issue or when all original jurisdiction claims have been dismissed] * *

*, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. * * *.

****

(d) The period of limitations for any claim asserted under subsection (a) * * * shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

28 U.S.C. § 1367 (1994).

It is undisputed that the federal district court had original jurisdiction over appellants' ADEA claim, because that claim raised a federal question. *See* 28 U.S.C. § 1331 (1994) ("district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"). In addition, the gravamen of both the ADEA and MHRA claims was discrimination based on age. Thus, the federal district court had mandatory, supplemental jurisdiction over appellants' MHRA claim, which was "so related to [the ADEA claims] that they form[ed] part of the same case or controversy" under 28 U.S.C. § 1367(a).

Nevertheless, the state district court in this case concluded that appellants' claims were not tolled under 28 U.S.C. § 1367(d). The court reasoned that because these claims were dismissed on Eleventh Amendment grounds, the federal district court never had "original" jurisdiction over them. Thus, the issue here is whether the Eleventh Amendment divested the federal district court of its original,

mandatory, and supplemental jurisdiction, such that jurisdiction never attached.

The Eleventh Amendment has been described as a "bar[] to federal court jurisdiction over a suit between an unconsenting State and one of its citizens." *Humenansky v. Regents of Univ. of Minn.*, 152 F.3d 822, 823-24 (8th Cir. 1998) (ADEA claim against University in federal court barred by Eleventh Amendment). The Eleventh Amendment, however, is not a typical jurisdictional limitation because it can be waived and because a federal court has discretion to raise it sua sponte. *Parella v. Retirement Bd. of Rhode Island Employees' Retirement Sys.*, 173 F.3d 46, 55 (1st Cir. 1999). Although the Eleventh Amendment provides a state with an immunity defense, it does not necessarily destroy a federal district court's underlying jurisdiction:

> [B]ecause Eleventh Amendment immunity can be waived, the presence of an Eleventh Amendment issue does not threaten the court's underlying power to declare the law. If this were not the case, sua sponte consideration of a possible Eleventh Amendment bar would have to be obligatory, not discretionary - but the Supreme Court has now clearly stated that courts are free to ignore possible Eleventh Amendment concerns if a defendant chooses not to press them.

Id. at 55-56 (citing *Wisconsin Dept of Corrections v. Schacht*, 118 S. Ct. 2047, 2052-53 (1998)).

In *Schacht*, the Supreme Court considered whether removal jurisdiction is destroyed when one of the removed claims is subject to an Eleventh Amendment bar. 118 S. Ct. at 2051. Similar to the federal question jurisdiction here, removal jurisdiction requires "original jurisdiction." 28 U.S.C. § 1441(a). The Supreme Court concluded that while the Eleventh Amendment may place a particular claim

beyond the power of the federal courts to decide, it does not destroy previously existing original jurisdiction. *Id.*, 118 S. Ct. at 2052-53. The Court further recognized- the distinction between diversity jurisdiction, which is automatically destroyed if one party is not diverse, and original jurisdiction, which is not destroyed even if the Eleventh Amendment is successfully asserted. *Id.* Thus, *Schacht* supports appellants' position that the Eleventh Amendment does not destroy or vitiate original jurisdiction until it is successfully asserted by a state or state entity.

The University argues that even if the federal district court had original jurisdiction over appellants' ADEA claim, 28 U.S.C. § 1367(d) does not toll the limitations period because appellants' state law MHRA claim was not dismissed by the federal district court for one of the reasons enumerated in 28 U.S.C. § 1367(c) (federal district court may "decline" to exercise supplemental jurisdiction in certain circumstances, including one in which claim raises complex issue of state law or court has dismissed all claims over which it has original jurisdiction). The University argues that because the federal district court was required to dismiss appellants' state law claim under the Eleventh Amendment, the court did not "decline" to exercise supplemental jurisdiction over that claim.

The University's argument is partially correct: MHRA claims are subject to the Eleventh Amendment. *See, e.g., Mayer v. University of Minn.*, 940 F. Supp. 1474, 1476 (D. Minn. 1996) (Eleventh Amendment bars federal court jurisdiction over state law claims under the MHRA, against unconsenting states or state officials) (citing *Pennhurst State Sch. Hosp. v. Halderman*, 465 U.S. 89, 104 S. Ct. 900 (1984)). Thus, the federal district court in this case may have also dismissed appellants' MHRA claim under the Eleventh Amendment.

A close reading of 28 U.S.C. § 1367, however, establishes that the tolling provisions of subsection (d) apply

to "any" claim asserted under subsection (a), which discusses original and supplemental jurisdiction. Subsection (d) does not require a supplemental state law claim to be dismissed for a reason under subsection (c) in order for that claim to be tolled. Rather, subsection (d) expressly states:

> The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

28 U.S.C. § 1367(d). Thus, the plain language of subsection (d) allows tolling of any claim dismissed by a federal district court, whether dismissed on Eleventh Amendment grounds or at the discretion of the federal district court under subsection (c).

Finally, at oral arguments before this court, counsel for the University repeatedly represented that "state law claims against a state can never be brought in federal district court" and that the "federal court never had subject matter jurisdiction over the state law claims," citing the Supreme Court's decision in *Pennhurst*. *Pennhurst* discusses a federal district court's "pendent" jurisdiction over state law claims and requires a federal court, once an Eleventh Amendment immunity defense is raised, to "examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Pennhurst*, 465 U.S. at 121, 104 S. Ct. at 919. At no point, however, does the Supreme Court discuss "subject matter jurisdiction" or hold that the Eleventh Amendment destroys or vitiates subject matter jurisdiction over state law claims.

Moreover, *Pennhurst* was decided in 1984, prior to the 1990 enactment of 28 U.S.C. § 1367, which codified the case law doctrines of "pendent" and "ancillary" jurisdiction under the name of "supplemental" jurisdiction. *See* David F. Siegel, *Practice Commentary*, "The 1990 Adoption of § 1367, Codifying 'Supplemental' Jurisdiction," *reprinted in* 28 U.S.C.A. § 1367, at 829 (West 1993). Although *Pennhurst* remains good law, it must be read in conjunction with 28 U.S.C. § 1367 and with recent cases discussing the Eleventh Amendment, such as *Schacht*.

We therefore conclude that the district court erred in granting summary judgment to the University. Under 28 U.S.C. § 1367(d), the statute of limitations governing appellants' MHRA claim was tolled during the pendency of their federal district court action.

II.

Appellants alternatively argue that the limitation period should be equitably tolled under the facts of this case. The filing requirement of Minn. Stat. § 363.14 is subject to equitable tolling. *Ochs v. Streater, Inc.*, 568 N.W.2d 858, 860 (Minn. App. 1997). Factors to consider include prejudice to a defendant and the conduct of the plaintiff. *Id.* The burden is on appellants to prove they are entitled to equitable tolling. *See Bartlett v. Miller & Schroeder Muns, Inc.*, 355 N.W.2d 435, 441 (Minn. App. 1984).

There is little or no evidence that the University would be prejudiced if appellants' claims were equitably tolled. Appellants have asserted no new claims in this state district court action. Thus, any discovery the University has undertaken may be used here. Perhaps more importantly, the University could have notified appellants that it would not consent to suit in federal district court, thus allowing appellants time to file in state court; rather, the University waited nine months before asserting its Eleventh Amendment

defense. Any prejudice to either party was partly caused by the University's own actions.

With respect to appellants' conduct, the lack of clarity and clear precedent on the issues involved justifies equitable tolling. *See Capital Tracing, Inc. v. United States*, 63 F.3d 859, 862 (9th Cir. 1995). We cannot fault appellants for failing to simultaneously file identical lawsuits in federal and state courts. At the time appellants brought their action in federal district court, federal law was unclear on whether a state was entitled to Eleventh Amendment immunity from ADEA claims. Indeed, federal circuits are split on this issue, and since the filing of appellants' lawsuit, the Eighth Circuit has taken a minority position and held that the Eleventh Amendment defense is available on ADEA claims against a state. *See Humenansky*, 152 F.3d at 825 n.2 (noting Eighth Circuit's disagreement with other circuits). Moreover, an appeal taken by appellants to the Eighth Circuit has been held in abeyance pending a decision by the Supreme Court in a case involving this same issue. *See Kimel*, 139 F.3d 1426. Finally, appellants could reasonable interpret 28 U.S.C. § 1367 as allowing tolling of their claims. Given the lack of clarity in this area, appellants' decision to file suit only in federal district court was legally sound and not based on their attorney's incorrect interpretation of the law. *Cf. Ochs*, 568 N.W.2d at 860 (equitable tolling not appropriate where plaintiff's choice of remedies based on attorney's incorrect interpretation of law).

We therefore conclude that even if appellants are not entitled to relief under 28 U.S.C. § 1367, their claims were equitably tolled during the pendency of their federal district court action.

DECISION

We reverse the district court's grant of summary judgment to the University. The University's assertion of an

Eleventh Amendment defense did not vitiate or destroy the federal district court's underlying original jurisdiction over appellants' ADEA claim or its mandatory, supplemental jurisdiction over appellants' MHRA claim. Thus, under 28 U.S.C. § 1367(d), the 45-day limitations period for asserting appellants' MHRA claim was tolled during the pendency of appellants' federal district court action.

Reversed.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Lance Raygor and James Goodchild

Plaintiffs,

v.

University of Minnesota, a Minnesota State University,

Defendant.

Court File No.: EM 97-013037

ORDER AND MEMORANDUM

The above-captioned matter came before the Court for a hearing on March 2, 199, on Defendants' Motion to Dismiss. Howard L. Bolter, Esq., appeared on behalf of Plaintiffs. Andrew D. Parker, Esq., appeared on behalf of Defendants.

Based upon all the files, records and proceedings herein and upon the arguments of counsel, **IT IS ORDERED THAT:**

1. Defendants' Motion to Dismiss is **GRANTED**.
2. The accompanying memorandum is incorporated herein by reference

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Dated: 5/28/99

/s/
Cara Lee Neville
Judge of District Court

MEMORANDUM

I. Facts

The facts relevant to this motion are not disputed. Plaintiffs in this age discrimination case are two former employees of the University of Minnesota. Following their alleged unlawful termination, Plaintiffs on August 23, 1995 filed charges of discrimination with the Minnesota Department of Human Rights (MDHR). On July 17, 1996, the MDHR dismissed the charges of both Plaintiffs. Dismissal letters indicated that civil action may be brought in court within 45 days. Plaintiffs evidently received the letters on July 18, 1996. On or about August 30, 1996, Plaintiffs commenced separate actions against Defendants in the United States District Court, alleging violations of the federal Age Discrimination in Employment Act (ADEA) and the Minnesota Human Rights Act (MHRA). The two actions were subsequently consolidated. Thereafter, Defendants moved to dismiss based upon the Eleventh Amendment (sovereign immunity)[1], and on July 11, 1997 the motion was granted. In its order, the federal district court dismissed Plaintiffs' state law claims without prejudice.[2] Within 45 days of dismissal of their federal court action, Plaintiffs commenced the instant action, which contains a single count alleging violations of the MHRA. The instant action has been stayed pending the outcome of the federal court appeal, but the stay has been lifted for the limited purpose of hearing Defendants' present motion to dismiss.

[1] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[2] Plaintiffs have appealed the decision to the 8th Circuit Court of Appeals. As of the date of this order, the appeal has not been decided.

II. Limitations Periods

This motion to dismiss presents a pure question of law concerning application of statutory and equitable tolling provisions to a statute of limitations. The MHRA requires that a person claiming unlawful employment discrimination first file a complaint with the MDHR as a precondition to suit. There is no dispute as to whether Plaintiffs did so within the required 180 days. The statute contains a second limitations period, allowing a claimant 45 days following receipt of a letter from the MDHR rejecting their claim (commonly known as a "right to sue" letter) in which to commence a civil court action. Failure to do so will render any subsequent suit untimely, resulting in dismissal upon motion by a defendant.

In the instant case, the Plaintiffs timely commenced their claims in federal court under the MHRA, invoking federal supplemental jurisdiction pursuant to 28 U.S.C. § 1367. Their state court claims, however, were filed well outside the 45-day limitations period. The question then is whether the federal court action tolled application of the 45-day limitations period. (The state court action was filed less than 45 days after the federal court action was dismissed). In opposing the instant motion to dismiss, Plaintiffs raise two possible grounds for tolling, statutory and equitable. These will be addressed in turn.

III. Statutory Tolling

Plaintiffs bringing an action in federal district court premised on federal question jurisdiction may now assert connected state court claims under the federal court's supplemental jurisdiction. 28 U.S.C. § 1367(a) (1993). Under that section, supplemental jurisdiction applies "in any civil action of which the [federal] district courts have original jurisdiction". Id. Subsection (d) of the same statute contains

a provision tolling potential state court claims during their pendency in federal court, and for thirty days after their dismissal. 28 U.S.C. § 1367.[3] Defendants in moving to dismiss assert that the tolling provision does not apply, because Plaintiffs' ADEA claim does not qualify as one in which the federal court had "original jurisdiction".

The question presented on this motion appears to be one of first impression, namely whether dismissal of a federal law claim on Eleventh Amendment grounds means that the dismissing court never had "original" jurisdiction under 28 U.S.C. § 1367(a) for purposes of that statute's tolling provision. Plaintiffs in reliance on Franklin v. Zain, 152 F.3d 783 (8th Cir. 1998) assert that because the federal court in this case dismissed Plaintiffs' state law claims without prejudice, the tolling statute must apply. Franklin, however, is clearly distinguishable. Unlike the instant case, the plaintiff in Franklin brought a federal civil rights action and pendant state law claims against both the state and a state employee, the latter in his private as well as official capacity. The court's holding that the statutory tolling provision applied only applied to the non-state defendant. All claims against state defendants had been dismissed on immunity grounds, and were not the subject of this ruling. Moreover, the claim to which tolling applied had been dismissed for failure to state a claim rather than on grounds of immunity, as in the instant case.

Neither side has cited to any relevant legislative history, and no cases have been found on point. In cases involving dismissal of actions against state employees on the basis of qualified immunity, federal courts declining to exercise supplemental jurisdiction over remaining state law claims have commented that such claims are tolled pursuant to 28

[3] Tolling applies if "any claim asserted under subsection (a)" is dismissed. In the instant case, the Federal district court dismissed the pendant state law claims without prejudice.

U.S.C. § 1367(d). See, e.g., Sapp v. Cunningham, 347 F.Supp. 893 (D. Wyo. 1994) (dismissing § 1983 claims on basis of qualified immunity). However, in none of the cases reviewed did the court discuss whether original jurisdiction existed in the first instance.[4]

For the reasons stated more fully below, the Court concludes that the tolling provision does not apply here because the federal district court never had "original jurisdiction" over the controversy. The act of bringing a civil action does not confer jurisdiction. It does not matter that the text of the Eleventh Amendment does not contain the words "jurisdiction" or "original jurisdiction". The primary source of federal jurisdiction is the United States Constitution, and limiting the jurisdictional reach of the federal courts is precisely what the Eleventh Amendment does. Although the federal district court dismissed Plaintiffs' state law claims without prejudice, it dismissed the ADEA claim based upon an absence of subject matter jurisdiction.

A Louisiana court recently addressed this issue for purposes of application of a state tolling statute. In Allo v. Horne, 636 So.2d 1048 (La. App. 1994), plaintiff bus driver brought a federal court action against a school board and various individuals, alleging breach of a various federal civil rights laws and pendant state law claims. The federal district court subsequently dismissed the federal law claims for failure to state a claim. The court then declined to accept jurisdiction over the remaining pendant state law claims, which it dismissed without prejudice for lack of subject matter jurisdiction. In a later-filed, co-extensive state court

[4] The failure of the courts to address this question perhaps owes to fundamental difference between Eleventh Amendment immunity, which applies to states, and qualified immunity, which applies derivatively to private individuals employed by states, acting under the color of state law. In the latter case the court properly exercises original jurisdiction because the individual has been sued qua individual. A second possibility is that the individual defendants simply have never raised this argument before.

action, defendants moved to dismiss based on statute of limitations (known as "prescription" in Louisiana). For purposes of applying the state's tolling law, the issue for determination was whether the federal court was a "court of competent jurisdiction" in the prior action. The defendants argued that tolling did not apply because the state claims, which plaintiff asserted in his state court action, had been dismissed by the federal court for lack of subject matter jurisdiction. The court disagreed, noting that one must look at the entire complaint to determine whether the federal court has jurisdiction in the first instance. United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130 (1966). Central to its ruling that the federal action tolled application of the limitations period, the court observed that the federal claims had been dismissed on the merits rather than for want of subject matter jurisdiction. Accordingly, the federal court was one of competent jurisdiction.[5]

The instant case is distinguishable from Allo because here both the state and federal claims were dismissed for lack of subject matter jurisdiction.[6] Based on the logic of Allo, the complaint to the district court herein was not a civil action of which the court had "original jurisdiction", and the tolling provision of 28 U.S.C. § 1367 does not apply.

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[5] Nowhere in the decision did the court discuss the federal tolling statute under consideration in the instant case. The decision also contains no discussion of 11th Amendment immunity, which evidently was not raised as a defense in the federal court action.

[6] The court's opinion reads in full as follows:

> Defendant moves to dismiss, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The Court conducted a telephone conference in this matter on July 10, 1997. Based on the files, records, and proceedings herein, and for the reasons set forth during the conference, IT IS ORDERED that: Defendant's motion is granted. Plaintiffs' claims are dismissed without prejudice.

Although this opinion does not describe the nature of the immunity defense, the basis for dismissal of all claims, federal and state, is Rule 12(b)(1), dismissal for lack of subject matter jurisdiction.

IV. Equitable Tolling

Equity permits a court to relieve a party from the preclusive effect of a statute of limitations in the furtherance of justice. As explained by the court in Bartlett v. Miller and Schroeder Municipals, Inc., 355 N.W.2d 435, 439 (Minn. Ct. App. 1984) (citation omitted), "Tolling principles are a creature of equity and the right to a tolling of the statute of limitations accrues only when the interests of justice require it." Prejudice to defendants is a valid consideration for purposes of this doctrine. Ochs v. Streater, Inc., 568 N.W.2d 858 (Minn. Ct. App. 1997). However, it has been held that equitable tolling is reserved for circumstances that are "truly beyond the control of the plaintiff." Shempert v. Harwick Chemical Corp., 151 F.3d 793, 797 (8th Cir. 1998) (holding that Title VII action not tolled where plaintiff failed to sign and return the Charge to the EEOC before the November 11th expiration of the filing period, despite the fact that she only received it in the mail on November 9th); Ochs, supra (employee was not entitled to equitable tolling of 45-day limitations period in which to bring age discrimination action, where employee offered no evidence that circumstances beyond his control prohibited him from serving complaint within statutory period).

In order for the doctrine to apply, a plaintiff must make a showing of excusable neglect, which may or may not be attributable to defendant. Schlueter v. Anheuser-Busch, Inc., 132 F.3d 455, 458 (8th Cir.1998) (holding that actions taken by EEOC worker excused employee's late filing of Title VII charge). But see Arigo v. U.S., 980 F.2d 1159, 1162 (8th Cir. 1992) (citing Irwin v. Veterans Admin., 498 U.S. 89, ----, 111 S.Ct. 453, 458 (1990)) (equitable tolling does not extend to "garden variety cases involving excusable neglect"). However, "innocent inadvertence" will not toll the statute same immunity defense raised by the Defendants. There was

no binding authority in the Eighth Circuit, which had not yet passed on this question.[7]

The fatal flaw in Plaintiffs' argument is that there was no lack of clarity as to whether they could pursue supplemental state law claims. This is to say that even had the court concluded that it could hear Plaintiffs' federal law (ADEA) claim against Defendants, the court would have had to dismiss their state law (MHRA) claims for lack of jurisdiction, supplemental or otherwise. See Lembach v. State of Indiana, 987 F.Supp. 1095 (N.D. Ind. 1997.) (11th Amendment bars damages claims against state, and court cannot assert supplemental jurisdiction over claims otherwise barred by the 11th Amendment); Doran By and Through Doran v. Condon, 983 F.Supp. 886, 891 (D. Neb. 1997) (dismissing state from suit entirely "[b]ecause Plaintiffs' only claims against the defendant State of Nebraska are state-law tort claims"). Indeed, in none of the seven cases from other circuits cited by Plaintiffs for the proposition that a state defendant may be subject to suit in federal court under ADEA did the plaintiff even assert supplemental or pendant state-law claims against the state defendants. At the time Plaintiffs brought their federal court action, it was (and remains) settled law that the federal courts lacked matter jurisdiction to hear these supplemental claims, irrespective of whether the ADEA action could be maintained. See Pennhurst State School & Hosp. v. Halderman, 104 S.Ct. 900, 907, 465 U.S. 39 (1984) (states are immune from suit in federal court for violations of state law).

Defendants cites Ochs, supra, for the proposition that an attorney's erroneous interpretation of a statute of limitations

[7] Complicating matters is the fact that the court in which the action was brought previously ruled that federal courts do not have jurisdiction over federal discrimination claims asserted against states. Humenansky v. Regents of Univ. of Minnesota, 958 F. Supp. 439 (D. Minn. 1997). However, the 8th Circuit's decision affirming that ruling appears to have been rendered after Plaintiffs commenced their federal court action.

will not warrant equitable tolling. Although Ochs is distinguishable,[8] another case cited by Defendants, Bonhiver v. Graff, 248 N.W.2d 291 (Minn. 1976) is dispositive. In Bonhiver, the Court concluded that "the commencement of an action in a federal district court which lacks jurisdiction does not toll the statute of limitations". The parties in that case arguing for estoppel originally were putative class members in a federal class action suit. Said plaintiffs, however, failed to meet the $10,000 jurisdictional minimum, depriving the federal court of jurisdiction to hear their claims. Accordingly, there could be no tolling of the statute of limitations to allow their intervention in a subsequent state court action, which was filed after the statute of limitations had run on the claims.

Plaintiffs attempt to distinguish Bonhiver, asserting that the federal district court initially had federal question jurisdiction over their ADEA claim and supplemental jurisdiction over their MHRA claim, and that federal jurisdiction was dislodged only after Defendants prevailed on their immunity defense. Plaintiffs in so arguing creates a distinction without a difference. As applied to the facts of this case, sovereign immunity is identical to the absence of subject matter jurisdiction, functionally and as a matter of definition.

That a party might raise sovereign immunity based on the Eleventh Amendment as an "affirmative defense" does not presuppose that the court had jurisdiction over the matter in

[8] The court's rejection of plaintiff's limitations argument in Ochs was not part of its analysis of equitable tolling at all. Rather, the ambiguity argument was part of a question of statutory construction. In that case, counsel attempted to create ambiguity in the law where none existed in order to avoid dismissal based upon the statute of limitations. In the court's word, counsel "contrive[d] a series of arguments to revive his claim." Id. at 859. Specifically, counsel argued that the words "bring an action" must mean something other than "commence an action", because a separate statute calls for the chapter's provisions to be liberally construed. The court disagreed, holding that to "bring" unambiguously meant to "commence".

the first place.[9] Sovereign immunity is an inherent recognition that a court lacks jurisdiction. As noted by the Justice Powell, "A State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued." Pennhurst, 104 S.Ct. at 907. He went on to describe the Eleventh Amendment as an "explicit limitation on federal jurisdiction". Id. at 917. See also Moore v. State of Indiana, 999 F.2d 1125, 1129 (7th Cir.1993) (11th Amendment operates to divest the court of subject matter jurisdiction). The historic basis for this view has been described as follows: "Nothing seems more clear than that this immunity of the King from the jurisdiction of the King's courts was purely personal. How it came to be applied in the United States of America, where the prerogative is unknown, is one of the mysteries of legal evolution." Spanel v. Mounds View School District No. 621, 118 N.W.2d 795, 800, 264 Minn. 279 (1962) (quoting Justice Traynor) (emphasis supplied).

An exception arises in rare cases involving the application of a sovereign immunity defense to a situation involving concurrent jurisdiction, also known as dual sovereignty. In Gavle v. Little Six, Inc., 555 N.W.2d 284 (Minn. 1996), a non-Indian employee of a tribe-owed business brought a civil action in state district court on state law claims arising from her employment. The court explained the immunity issue as follows:

> At the heart of this case is the issue of whether tribal business entities are subject to the application of state civil law in state court. To answer this question, we must analyze two related legal concepts--jurisdiction and sovereign immunity. Though it is sometimes said that state or federal courts are deprived of jurisdiction through the application of tribal sovereign immunity, the concept is more properly thought of as an affirmative defense, to be asserted by a tribe, tribal official or tribal entity as a bar to a particular lawsuit.[10]

Gavle, 555 N.W.2d at 288. In Gavle, the court specifically ruled that it had jurisdiction to hear such claims, even though they arose in part within the jurisdictional boundaries of a sovereign nation. Nonetheless, the court went on to hold that the tribal corporation was entitled to sovereign immunity and, accordingly, dismissal of plaintiff's action. Concurrent jurisdiction in that case was premised on the special constitutional status of Native Americans and other historical considerations, which on the facts of Gavle permitted the state to share in jurisdiction over the case. These factors are absent in the present case, insofar as federal courts lack jurisdiction to hear actions against states altogether. See Pennhurst, 104 S.Ct. at 918 ("[the Eleventh] Amendment thus is a specific constitutional bar against hearing even federal claims that otherwise would be within the jurisdiction of the federal courts"). Without more, lack of prejudice to a defendant is insufficient grounds to invoke equitable tolling. See Baldwin County Welcome Center v. Brown, 466 U.S. 147, 104 S. Ct. 1723, 1726 (1984) (absence of prejudice is "not an independent basis for invoking the doctrine" of equitable tolling). Plaintiffs have not met the requirements for equitable tolling, and therefore, Defendants' motion to dismiss must be granted.

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[9] In point of fact, Defendant to the instant case prevailed in the federal district court action on a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.

[10] The Minnesota Supreme Court's classification of immunity as an "affirmative defense" rather than a jurisdictional bar makes sense only in the content of concurrent jurisdiction. See discussion above. In this light, it is significant to note that the Court chose its words carefully, describing tribal sovereign immunity as an affirmative defense.

V. Conclusion

For the reasons set forth in this memorandum, Defendants' Motion to Dismiss is granted. Neither statutory tolling nor equitable tolling applies, and therefore Plaintiffs' suit is untimely.

C.L.N.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
4-96-CV-862
4-96-CV-863

Lance Raygor	)	
	)	
v.	)	
	)	
University of Minnesota	)	
	)	ORDER
James Goodchild	)	
	)	
v.	)	
	)	
University of Minnesota	)	

Defendant moves to dismiss, pursuant to Rule 12 (b) (1) of the Federal Rules of Civil Procedure. The Court conducted a telephone conference in this matter on July 10, 1997. Based on the files, records, and proceedings herein, and for the reasons set forth during the conference, IT IS ORDERED that:

Defendant's motion is granted. Plaintiffs' claims are dismissed without prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 11th, 1997

/s/
JAMES M. ROSENBAUM
United States District Judge

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Lance Raygor and James Goodchild Plaintiffs, v. University of Minnesota, a Minnesota State University, Defendant.	)	Case No. EM 97-013037 **AFFIDAVIT OF MATTHEW E. JOHNSON**

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

Matthew E. Johnson, being first duly sworn, states as follows:

1. I am licensed to practice law in the State of Minnesota. I am one of the attorneys representing the Defendant in this action, the University of Minnesota.

2. Attached as **Exhibit 1** is a true and correct copy of an August 23, 1995, letter from the Minnesota Department of Human Rights to the University of Minnesota concerning Charge No. ER19951221, which was filed with the Department by Lance Raygor.

3. Attached as **Exhibit 2** is a true and correct copy of an August 23, 1995, letter from the Minnesota Department of Human Rights to the University of Minnesota concerning

Charge No. ER19951220, which was filed with the Department by James Goodchild.

4. Attached as **Exhibit 3** is a true and correct copy of a July 17, 1996, letter from the Minnesota Department of Human Rights stating that the Department has dismissed Charge No. ER19951221 and that Mr. Raygor may bring a civil action within 45 days of his receipt of the letter.

5. Attached as **Exhibit 4** is a true and correct copy of a July 17, 1996, letter from the Minnesota Department of Human Rights stating that the Department has dismissed Charge No. ER19951220 and that Mr. Goodchild may bring a civil action within 45 days of his receipt of the letter.

6. Attached as **Exhibit 5** is a true and correct copy of a Complaint filed by Lance Raygor against University of Minnesota in the United States District Court for the District of Minnesota, dated August 29, 1996.

7. Attached as **Exhibit 6** is a true and correct copy of a Complaint filed by James Goodchild against University of Minnesota in the United States District Court for the District of Minnesota, dated August 29, 1996.

8. Attached as **Exhibit 7** is a true and correct copy of an Order that was filed May 6, 1997, assigning Mr. Raygor's action, No. 4-96-CV-862, and Mr. Goodchild's action, No. 4-96-CV-863, to the same judge so that they may be considered together.

9. Attached as **Exhibit 8** is a true and correct copy of Defendant's Memorandum of Law in Support of its Motion to Dismiss, dated June 3, 1997, in the consolidated actions of Raygor v. University of Minnesota, No. 4-96-CV-862 (D. Minn.), and Goodchild v. University of Minnesota, No. 4-96-CV-863 (D. Minn.).

10. Attached as **Exhibit 9** is a true and correct copy of a July 11, 1997, Order granting Defendants Motion to Dismiss in the consolidated actions of Raygor v. University of Minnesota, No. 4-96-CV-862 (D. Minn.), and Goodchild v. University of Minnesota, No. 4-96-CV-863 (D. Minn.). One

day before the hearing on the University's motion. Judge James M. Rosenbaum initiated a conference call with Howard L. Bolter, counsel for Plaintiffs, and me. Judge Rosenbaum informed us that there was no need for a hearing on the motion because, upon reviewing the motion papers, he had decided to grant Defendant's motion for the reasons stated in Humenansky v. Board of Regents of the Univ. of Minnesota, 958 F. Supp. 439 (D. Minn. 1997).

11. Attached as **Exhibit 10** is a true and correct copy of a Notice of Appeal filed jointly by Mr. Raygor and Mr. Goodchild in the United States District Court for the District of Minnesota on or about August 6, 1997. This appeal still is pending at the United States Court of Appeals for the Eighth Circuit.

12. Attached as **Exhibit 11** is a true and correct copy of the Complaint, dated July 30, 1997, in the present action.

13. Attached as **Exhibit 12** is a true and correct copy of an October 29, 1997, Order in the present action.

14. Attached as **Exhibit 13** is a true and correct copy of a December 31, 1998, Order in the present action.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

/s/
Matthew E. Johnson

Subscribed and sworn to before me
this ____ day of _____, 1999.

_____
Notary Public

Minnesota Department of Human Rights

Aug. 23, 1995

REF: ER19951221
Lance Raygor
vs.
University of Minnesota

Dr Nils Hasselmo President
University of Minnesota
202 Morrill Hall
101 Church Street S.E.
Mpls, MN 55455-

Dear Dr Nils Hasselmo:

The Minnesota Department of Human Rights has received a charge alleging that an unfair discriminatory practice has been committed in violation of the Minnesota Human Rights Act, Minn. Stat., Chapter 363. Acceptance of a charge by the Department does not mean that a decision has been made that a violation of the law has occurred.

Since the Charging Party filed earlier with the Equal Employment Opportunity Commission, that agency will address the concerns raised by the Charging Party.

The Minnesota Department of Human Rights will accept the EEOC's final finding or resolution of the charge and accept it as its own unless a party to the charge requests the Department to conduct a review of the EEOC's final action. To exercise this right, you must submit your request for review in writing to this office at the above address within 10 working days of the date on which you receive the EEOC's notice of its final finding or resolution. Should the EEOC establish that it lacks jurisdiction, the Department may assume jurisdiction to

further process the charge without a Charging Party request. However, claims of disability discrimination which are eligible for remedy under the Minnesota Workers' Compensation Act are not jurisdictional to the Department and cannot be accepted by this agency for review, processing, or issuance of a decision. Karst v. F.C. Hayer Co., Inc., 447 N.W.2d 180 (Minn. 1989).

You should be informed the Charging Party has the right to bring a civil suit in state district court 45 days after the filing of his charge: this right commences on Sep. 21, 1995.

Questions concerning this notice or your right to request review should be directed to the Department at (612) 296-9061.

Sincerely,

/s/
David Beaulieu
Commissioner

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974: See Privacy Act Statement before completing this form.

AGENCY: ☐ FEPA ☒ EEOC — CHARGE NUMBER: 265951267

Minnesota Department of Human Rights and EEOC
State or local Agency, if any

NAME (Indicate Mr., Ms., Mrs.): Mr. Lance Raygor — HOME TELEPHONE (Include Area Code): (612) 784-0385

STREET ADDRESS: 2584 Moundsview Drive, Moundsview, MN 55112 — CITY, STATE AND ZIP CODE — DATE OF BIRTH: 12/29/41

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME: University of Minnesota — NUMBER OF EMPLOYEES, MEMBERS: over 100 — TELEPHONE (Include Area Code): (612) 625-5000

STREET ADDRESS: 100 Church St. SE, Minneapolis, MN 55455 — CITY, STATE AND ZIP CODE — COUNTY: Henn.

NAME — TELEPHONE NUMBER (Include Area Code)

STREET ADDRESS — CITY, STATE AND ZIP CODE — COUNTY

CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es).)
☐ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN
☐ RETALIATION ☒ AGE ☐ DISABILITY ☐ OTHER (Specify)

DATE DISCRIMINATION TOOK PLACE: EARLIEST 12/14/94 LATEST /, /
☒ CONTINUING ACTION

THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)):

I. I am a 53 year old male and have been working for the respondent for approximately 29 years. I have been a Senior Broadcast Technician for 9 years. On December 2, 1994, I was offered a Rule of 75/early retirement program for the stated reason being my age and high wage. On and after December 12, 1994, when I rejected the offer of Rule of 75/early retirement, I had my job duties reassigned, different job duties were assigned to me and I was assigned weekends and night hours. In short, the respondent stated they were to reclassify me to a Broadcast Technician, which would result in a demotion in job duties and a significant reduction in my pay. Such conduct is ongoing to the present date.

II. Respondent's reason for adverse action is: I am no longer qualified for the position of Senior Broadcast Technician.

III. Respondent's adverse action is age discrimination in violation of the Age Discrimination in Employment Act.

I want this charge filed with both the EEOC and the State or local agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

HOWARD L. SOLTER
NOTARY PUBLIC - MINNESOTA
HENNEPIN COUNTY
My Commission Expires Jan 31 1998

Date — Charging Party (Signature)

NOTARY - (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT: Lance D. Raygor

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Day, month, and year): 7/15/95

BEST AVAILABLE COPY

Minnesota Department of Human Rights

July 17, 1996

REF: ER19951221

Lance Raygor
2584 Moundsview Drive
Moundsview, MN 55112

vs.

University of Minnesota
202 Murrill Hall - 101 Church Street S.E.
Minneapolis, MN 55455

This letter is to inform you of the action taken by this agency on the above-referenced charge which was processed by the Equal Employment Opportunity Commission (EEOC) and referred to this agency for filing purposes only.

As part of the work-sharing agreement between EEOC and this agency, EEOC has notified us that they have closed their file in this matter. The Minnesota Department of Human Rights has therefore dismissed its file accordingly.

Please be informed that the Charging Party may be able to bring a civil suit in state district court within 45 days of receipt of this letter pursuant to Minnesota Statutes 363.14.

If you have any questions about this matter, please contact Karen Ferguson at (612) 296-9061.

Sincerely,

/s/
David Beaulieu

Commissioner

DB/dmrz

CP-RP

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Lance Raygor	)	
	)	
v.	)	4-96-CV-862
	)	
University of Minnesota	)	

James Goodchild	)	
	)	
v.	)	4-96-CV-863
	)	
University of Minnesota	)	

ORDER FOR REASSIGNMENT OF RELATED CASES

Case No. 4-96-CV-862, having been assigned to the Honorable James M. Rosenbaum, United States District Judge, and Case No. 496-CV-853, having later been assigned to the Honorable David S. Doty, United States District Judge, and said matters being related cases, IT IS ORDERED that:

1. Case No. 4-96-CV-863 be assigned to Judge Rosenbaum, nunc pro tunc, by use of a card on the civil rights list of the automated case assignment system, and the Clerk of Court shall void and reuse a card on the same list, pursuant to this Court's Assignment of Cases Order, dated February 5, 1993.

2. A copy of this Order shall be filed in each case.

Dated: April 30th, 1997

/s/
JAMES M. ROSENBAUM
United States District Judge

Dated: May 5, 1997

/s/
DAVID S. DOTY
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
4-96-CV-862
4-96-CV-863

Lance Raygor)
)
v.)
)
University of Minnesota)
) ORDER
)
James Goodchild)
)
v.)
)
University of Minnesota)

Defendant moves to dismiss, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The Court conducted a telephone conference in this matter on July 10, 1997. Based on the files, records, and proceedings herein, and for the reasons set forth during the conference, IT IS ORDERED that:

Defendant's motion is granted. Plaintiffs' claims are dismissed without prejudice.

LET JUDGMENT ENTERED ACCORDINGLY.

Dated: July 11th, 1997

/s/
JAMES M. ROSENBAUM
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Lance Raygor,

Plaintiff,

v. Case No. 4-96-CV-862/JMR/FLN

University of Minnesota,
a Minnesota state university,

Defendant.

NOTICE OF APPEAL

James Goodchild,

Plaintiff,

v. Case No. 4-96-CV-863/JMR/FLN

University of Minnesota,
a Minnesota state university,

Defendant.

Notice is hereby given that James Goodchild and Lance Raygor, Plaintiffs in the above entitled matter, hereby appeal to the United States Court of Appeals for the Eighth Circuit from Final Judgment entered in this action on the 14th day of July, 1997.

Dated: 8/6/97

BORKON, RAMSTEAD, MARIANI & LETOURNEAU, LTD.

By /s/
Howard L. Bolter - 192387
Attorney for Plaintiffs
485 Northstar East
608 Second Avenue South
Minneapolis, MN 55402
(612) 333-7155

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Lance Raygor and James Goodchild,

Plaintiffs,

97-13037

vs.

ORDER

University of Minnesota, a Minnesota State University,

Defendant.

The above-entitled matter came on for hearing before the Honorable Cara Lee Neville, Judge of Hennepin County District Court, on October 29, 1997. Howard Bolter, Esq. appeared on behalf of Plaintiff. Andrew Parker, Esq. appeared on behalf of Defendant.

Based upon all records, files and proceedings herein, the arguments of counsel, and the Court being fully advised in the matter, IT IS HEREBY ORDERED:

1. That Defendants' Motion to Stay Proceedings is **GRANTED**;

2. That this action shall be stayed until final judgment is entered in the consolidated appeal of Lance Raygor v. University of Minnesota and James Goodchild v. University of Minnesota, No. 97-3210 (8th. Cir. 1997); and

3. That this stay shall not affect the parties' presently existing procedural and substantive rights.

DATED: 10/29/97

BY THE COURT:

/s/
Cara Lee Neville
Judge of District Court

cc: Howard Bolter, Esq.
Andrew Parker, Esq.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Lance Raygor and James Goodchild,

Plaintiffs,

vs. ORDER LIFTING STAY

University of Minnesota, File No. EM 97-13037

Defendant.

The above matter came before the undersigned, Judge of District Court, on December 17, 1998, upon plaintiff's renewed motion to lift the stay in the above matter which was ordered on October 29, 1997.

Howard L. Bolter, Esq., appeared on behalf of the plaintiffs and moving party. Andrew D. Parker, Esq., appeared on behalf of the defendant.

IT IS HEREBY ORDERED that the stay ordered on October 29, 1997 shall be lifted for the limited purpose of the Statute of Limitations issue on summary judgment motion.

Dated: December 31, 1998

BY THE COURT:

/s/
Cara Lee Neville
Judge of District Court

Supreme Court, U.S.
FILED
MAY 2 2001
OFFICE OF THE CLERK

No. 00-1514

IN THE

Supreme Court of the United States

LANCE RAYGOR and JAMES GOODCHILD,

Petitioners,

v.

REGENTS OF THE UNIVERSITY OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

BRIEF IN OPPOSITION

MARK B. ROTENBERG
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LORIE S. GILDEA*
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QUESTION PRESENTED

Did the Minnesota Supreme Court correctly interpret precedent from this Court, including *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), when it held that the Minnesota Court of Appeals' application of 28 U.S.C. § 1367 to the facts of this case conflicted with this Court's Eleventh Amendment jurisprudence?

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Respondent Regents of the University of Minnesota respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Minnesota Supreme Court's decision in *Regents of the University of Minnesota v. Raygor*, 620 N.W.2d 680 (Minn. 2001). The Minnesota Supreme Court did not declare that a federal statute, 28 U.S.C. § 1367, was unconstitutional. The Minnesota Supreme Court correctly analyzed and followed precedent from this Court when it reversed the Minnesota Court of Appeals' application of this statute to the circumstances of this case. This case does not present an issue warranting this Court's review.

STATEMENT OF THE CASE

Petitioners Lance Raygor and James Goodchild alleged that the University of Minnesota discriminated against them on the basis of their age in connection with decisions made regarding their employment at the University. On or about August 23, 1995, Raygor and Goodchild filed charges of discrimination with the Minnesota Department of Human Rights ("MDHR"). Pet. App. A43-45. Petitioners alleged that they were discriminated against on the basis of age in violation of the Minnesota Human Rights Act ("MHRA"). Specifically, petitioners complained about changes the University made in their job assignments in December 1994. Pet. App. A45.

On July 17, 1996, the MDHR dismissed petitioners' claims. Petitioners received notice of the dismissal by letter on or about July 18, 1996. In the letters, the MDHR advised each petitioner that he could bring a civil action against the University "in state district court" within 45 days of receipt of the letter. Pet. App. 46.

Petitioners did not timely file claims for violation of the MHRA, as alleged in the petition. Pursuant to the notice petitioners received from the MDHR, any claim for violation of the MHRA had to be filed in *state district court* within 45 days of the time petitioners received notice from the agency. Pet. App. A46 (emphasis added). Rather than follow this directive, petitioners chose to bring their claims for violation of the state law in a court that had no jurisdiction over such claims, the federal district court. Indeed, when the University served its motion to dismiss the federal court action, petitioners in effect conceded that the state law claims did not belong in federal court and they did not even oppose the University's motion to dismiss these claims; while petitioners briefed the motion to dismiss on the federal law claims, they did not even brief the motion on the state law claims.

The federal court dismissed the federal case because it was barred by the Eleventh Amendment, a defense the University had asserted from the beginning by raising it in its answers to the complaints. Pet. App. A50. Following dismissal of their federal court case, petitioners filed their MHRA claims in Hennepin County District Court, on or about July 31, 1997, and the action was stayed pending petitioners' appeal of the dismissal of their federal court case. Following the University's filing of a motion to dismiss, the trial court lifted the stay for the limited purpose of hearing the University's motion. The trial court granted the motion by Order and Memorandum dated May 28, 1999. As the trial court correctly noted, the MHRA claims were filed in state court more than 45 days after petitioners received notice of dismissal from the MDHR. Moreover, as the trial court recognized, there was no basis to toll the state law limitations period. Petitioners argued that § 1367 applied to toll the MHRA statute of limitations. The trial court rejected this

argument. The trial court correctly recognized that § 1367 did not apply in this case because petitioners' claims did not fall within the "original jurisdiction" of the federal court. *See* Pet. App. A29-32. Accordingly, petitioners' MHRA claims were dismissed on the basis of the state law statute of limitations. Pet. App. A27-A38.

Petitioners appealed the ruling to the Minnesota Court of Appeals. The appellate court reversed, finding that 28 U.S.C. § 1367 tolled Minnesota's statute of limitations. *See Raygor v. Regents of the University of Minnesota*, 604 N.W.2d 128 (Minn. Ct. App. 2000), *review granted* (March 28, 2000).[1] There is no dispute that petitioners brought their state court action well after the statute of limitations applicable to MHRA claims had expired.[2] Rather than arguing that their action was within the state law statute of limitations, petitioners instead argued to the Minnesota Court of Appeals, as they had to the trial court, that their filing of a federal court action increased the time period they had within which to bring their state law claims in state court.

1. In the alternative, the court held that the doctrine of equitable tolling applied. The equitable tolling question is not at issue in the petition.

2. Under the MHRA, lawsuits must be commenced within one year of the date of the alleged discriminatory actions, or if, as in this case, the alleged victim of discrimination chooses to commence the process through the agency, within 45 days of the date notice of dismissal is received from the MDHR. *See* Minn. Stat. §§ 363.06, subd. 3 and 363.14, subd. 1 (1998). Petitioners alleged that they were discriminated against in December 1994. They received notice of dismissal from the MDHR on July 18, 1996, and the state court action was not filed until July 31, 1997. Accordingly, petitioners did not meet either the one-year time limit or the 45-day time limit provided for in the MHRA.

The Court of Appeals agreed with petitioners and held that the filing of MHRA claims in federal court tolled the Minnesota statute of limitations because of 28 U.S.C. § 1367. According to the intermediate appellate court, the federal court had "mandatory supplemental jurisdiction" over the petitioners' MHRA claims under § 1367. *See Raygor*, 604 N.W.2d at 131, Pet. App. A21. Based upon this erroneous construction of the statute, the appellate court held that the tolling provision in § 1367(d) applied. With the statute of limitations tolled under § 1367(d), the Court of Appeals concluded that petitioners' MHRA claims — which were filed in state court well after the time period provided for in the MHRA — were timely.

The Minnesota Supreme Court granted the University's petition for review of the Minnesota Court of Appeals decision and reversed. *See Regents of the University of Minnesota v. Raygor*, 620 N.W.2d 680 (Minn. 2001). The Minnesota Supreme Court recognized that the Court of Appeals had made an error of law. The Minnesota Supreme Court did not hold that 28 U.S.C. § 1367(d) is unconstitutional on its face. Rather, the Minnesota Supreme Court held that the Minnesota Court of Appeals' application of § 1367(d) to the state law claims filed against the University was inconsistent with this Court's Eleventh Amendment jurisprudence. The Minnesota Supreme Court held that the Court of Appeals' "*application* of section 1367(d) in this case is an unconstitutional infringement on state sovereign immunity in violation of the Eleventh Amendment[.]" *Id.* at 681 (emphasis added), Pet. App. A2.

REASONS FOR DENYING THE WRIT

Petitioners argue that this Court should review the Minnesota Supreme Court's decision because it holds that § 1367 is unconstitutional and because a "definitive decision by this Court regarding the constitutional question presented is of especial importance." (Petition at 6). Petitioners are wrong. The Minnesota Supreme Court did not hold that § 1367 was not constitutional; it simply held that this statute did not apply to this case. It was the Minnesota Court of Appeals' decision — not § 1367 — that was unconstitutional because it conflicted with the Eleventh Amendment. Precedent from this Court drove the Minnesota Supreme Court's conclusion. Petitioners are therefore incorrect to suggest that there is a void that this Court needs to fill. Finally, the Minnesota Supreme Court's decision does not conflict with decisions from other courts. Accordingly, there is no important constitutional or federal question presented in this case that requires clarification from this Court.

1. The Minnesota Supreme Court's Decision Is Consistent With, And Was Compelled By, Decisions From This Court.

Congress passed 28 U.S.C. § 1367, the statute at issue in this case, in 1990. The statute is a jurisdictional statute, like 28 U.S.C. §§ 1331 (giving federal courts subject matter jurisdiction over cases that arise under federal law) and 1332 (giving federal courts jurisdiction over cases between citizens of different states). In § 1367, Congress gave federal courts subject matter jurisdiction over claims which lack an independent basis for federal jurisdiction (*i.e.*, state law claims between non-diverse parties), that are so related to

claims within the scope of the court's jurisdiction (*i.e.*, federal question jurisdiction), that the case can properly be viewed as one controversy. Section 1367 provides, in pertinent part:

> (a) . . . in any civil action of which the district courts shall have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a) (1994).[3]

If a claim is within the scope of § 1367, Congress provided that the statute of limitations for this claim would be tolled while the claim was pending in federal court. According to the statute: "The period of limitations for any claims asserted under subsection (a) . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C. § 1367(d). Subsection (d) is the provision the Minnesota Court of Appeals relied upon to toll the statute of limitations for petitioners' MHRA claims. However, just like other jurisdictional statutes are limited by the Eleventh Amendment, § 1367 is also subject to the jurisdictional limitations of the Eleventh Amendment, as the Minnesota Supreme Court correctly recognized.

3. Prior to the adoption of § 1367, these non-federal claims were allowed to proceed in federal court under the common law doctrines of pendent and ancillary jurisdiction. *See, e.g., United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966).

The Eleventh Amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another Sate, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.[4] The Eleventh Amendment is a limitation on the judicial power of the United States, and therefore a limitation on the types of cases over which federal courts may exercise jurisdiction:

> "That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that *the entire judicial power granted by the Constitution does not embrace the authority to entertain a suit brought by private parties against a State without consent given . . .*"

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 98-99 (1984) (quoting *Ex parte State of New York*, 256 U.S. 490, 497 (1921)).[5] Consistent with the Eleventh

4. While the text does not specify that the Amendment applies to claims by citizens of a state against their own state, it has been the law since 1890 that the Eleventh Amendment also prohibits these claims from being pursued in federal court. *See Hans v. Louisiana*, 134 U.S. 1 (1890).

5. It is beyond dispute that the University is an arm of the State of Minnesota entitled to the protections of the Eleventh Amendment. *See, e.g., Treleven v. University of Minnesota*, 73 F.3d 816, 819 (8th Cir. 1996).

Amendment, the "judicial power of the United States" did not "extend to" petitioners' MHRA claims, as the Minnesota Supreme Court properly held.

It is well settled that the Eleventh Amendment applies to state law claims, like the MHRA claims at issue in this case.[6] It has been the law since at least 1984 that state law claims against state sovereigns cannot be filed in federal court. These claims are simply outside the scope of federal court jurisdiction. *See Pennhurst State School Hospital v. Halderman*, 465 U.S. 89 (1984).[7]

In *Pennhurst*, a class action lawsuit was filed on behalf of residents of Pennsylvania's state-run institution for mentally disabled individuals. The residents alleged violations of federal law and asserted state law claims as

6. The Eleventh Amendment also barred petitioners' federal claims from being pursued in federal court as the federal court recognized in its ruling. Pet. App. A50. Accordingly, the federal case was not properly within even the "original jurisdiction" of the federal court, as it must have been for § 1367 to apply. 28 U.S.C. § 1367(a). The absence of "original jurisdiction" was the basis for the trial court's conclusion that § 1367 did not apply to this case. *See* App. A32.

7. *Pennhurst* was decided six years before Congress enacted § 1367. Congress gave no indication in passing § 1367 that it meant to overrule *Pennhurst*. The statute is silent on this point. Without a clear expression from Congress, the Minnesota Court of Appeals had no basis to apply § 1367 to the University. *See Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) (" 'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.' ") (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)).

well under the doctrine of pendent jurisdiction. With respect to the state law claims, the trial court found a violation. The Supreme Court ruled that the Eleventh Amendment barred the federal court from deciding the state law claims. The Court noted that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Id.* at 106. *Pennhurst* holds that federal courts simply have no jurisdiction — pendent, "supplemental" or otherwise — over claims for violation of state law asserted against state sovereigns. *Id.* at 121 ("[N]either pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment.").

As the Minnesota Supreme Court recognized, *Pennhurst* was dispositive of the issue presented in this case. This Court dealt with the exact issue raised: whether a federal court had jurisdiction over state law claims filed against a state by its own citizens. At the time *Pennhurst* was decided, the federal court could consider state law claims against private defendants that were appended to federal claims brought against those defendants if they were part of the same constitutional case, under the doctrine of pendent jurisdiction. *See, e.g., United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The question decided in *Pennhurst* was whether the common law doctrine of pendent jurisdiction applied to state defendants, and this Court ruled that it did not.

Section 1367's "supplemental jurisdiction" is simply the codification of the common law principle of pendent jurisdiction. *See* H.R. Rep. No. 734, at 27-28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6873-74. If the common law version of the doctrine — pendent jurisdiction

— cannot constitutionally cover state law claims against states, there is no reason why the statutory version of this same doctrine — § 1367's "supplemental jurisdiction" — can cover these claims. *Pennhurst* resolved the issue by holding that these claims were not within the scope of federal jurisdiction. *Pennhurst* compelled the Minnesota Supreme Court's conclusion that § 1367 simply did not apply to petitioners' MHRA claims. Because § 1367 did not apply, the Minnesota Supreme Court correctly concluded that there was no basis to toll Minnesota's statute of limitations, and the petitioners' claims were properly dismissed as time barred.

The Minnesota Court of Appeals had dismissed *Pennhurst* with one sentence, concluding that "it must be read in conjunction with 28 U.S.C. § 1367. . . ." *Raygor*, 604 N.W.2d at 133, Pet. App. A24. This was a plain error of law, as the Minnesota Supreme Court recognized. Contrary to the suggestion by the Minnesota Court of Appeals, Eleventh Amendment jurisprudence has not changed or backed away from the conclusions in *Pennhurst*. Indeed, in recent Terms, this Court has continued its vigorous enforcement of the Eleventh Amendment as a bar to federal courts asserting *any* jurisdiction over claims against states. *See, e.g., Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). *See also Alden v. Maine*, 527 U.S. 706, 754 (1999) ("States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation."). Nothing in these cases supports the Minnesota Court of Appeals' suggestion that *Pennhurst* has been undermined. It is not *Pennhurst* that must be read in conjunction with § 1367 as the Court of Appeals suggested. Rather, it is § 1367 that must read against the

backdrop of *Kimel*, *College Savings Bank*, *Seminole Tribe*, *Alden*, and other cases where this Court has reaffirmed the Eleventh Amendment's limitations on federal jurisdiction. The Minnesota Supreme Court's decision is consistent with and was compelled by this jurisprudence.

Petitioners argue that the Minnesota Supreme Court's ruling would lead to duplicative lawsuits and inefficiencies. This Court has considered and squarely rejected this argument, as the Minnesota Supreme Court noted. The respondents in *Pennhurst* made exactly the same argument. This Court dismissed the argument:

> Respondents urge that the application of the Eleventh Amendment to pendent state-law claims will have a disruptive effect on litigation against state officials . . . It may be that applying the Eleventh Amendment to pendent claims results in federal claims being brought in state court, or in bifurcation of claims. That is not uncommon in this area . . . [T]he answer to respondents' assertions is that such considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State. That a litigant's choice of forum is reduced "has long been understood to be a part of the tension inherent in our system of federalism."

465 U.S. at 121-123 (citations and footnotes omitted). Some fifty years earlier, in *Missouri v. Fiske*, 290 U.S. 18, 25-26 (1933), this Court expressed the same view that the Eleventh Amendment trumps economy arguments like those petitioners offer here. The Court noted there that,

"[c]onsiderations of convenience open no avenue of escape from the [Eleventh Amendment's] restriction." *Id.* Petitioners offer no arguments here that support this Court's review of this precedent.

2. This Court Does Not Need To Resolve A Conflict In Decisions Construing Section 1367.

Petitioners suggest that the Minnesota Supreme Court decision is inconsistent with other decisions construing § 1367, and that this Court needs to grant review to resolve this conflict. There is no such conflict requiring review and resolution in this Court. Several courts have recognized, as did the Minnesota Supreme Court, that the "supplemental jurisdiction" provided in § 1367(a) does not and cannot undermine the Eleventh Amendment principles this Court applied in *Pennhurst*. *See, e.g.*, *Mascheroni v. Board of Regents of University of California*, 28 F.3d 1554, 1559 (10th Cir. 1994) ("That [plaintiff] attaches these state law claims to the Title VII complaint under the doctrine of supplemental jurisdiction does not render the Eleventh Amendment inapplicable"); *Lembach v. State of Indiana*, 987 F. Supp. 1095, 1098 (N.D. Ind. 1997) (since Eleventh Amendment bars state law claims, court cannot exercise supplemental jurisdiction over them under § 1367); *Doran v. Condon*, 983 F. Supp. 886, 890 (D. Neb. 1997) ("the grant of supplemental jurisdiction contained in 28 U.S.C. § 1367 cannot displace the Eleventh Amendment's explicit limitations on federal jurisdiction"); *Mayer v. University of Minnesota*, 940 F. Supp. 1474, 1476 (D. Minn. 1996) (Eleventh Amendment's "constitutional bar applies with equal force to pendent state claims"); *Clemes v. Del Norte County Unified School District*, 843 F. Supp. 583, 597 (N.D. Cal. 1994) (the effort in § 1367 "to streamline

procedural aspects of judicial access does not in any way support the substantive alteration of Eleventh Amendment jurisprudence"). *See generally* 16 *Moore's Federal Practice* ¶ 106.67, at 109-96 (3d ed. 1999) ("If the Eleventh Amendment applies directly to bar federal jurisdiction, the federal court of course cannot assert supplemental jurisdiction.").

The state cases that petitioners cite do not provide a basis for this Court to grant review. As set forth above, the Minnesota Supreme Court's decision was in accord with this Court's settled Eleventh Amendment jurisprudence. Moreover, the state intermediate appellate courts in the cases petitioners cite do not even appear to have addressed the question the Minnesota Supreme Court decided — that § 1367's "supplemental jurisdiction" does not apply to state law claims filed in federal court against a state sovereign. *See Blinn v. Florida Department of Transportation*, 2000 WL 1880213 * 6-7 (Fla. App. 1 Dist. Dec. 29, 2000) (holding that Congress had authority under the Necessary and Proper Clause to enact § 1367(d) and refusing to decide, because it was not timely raised, the argument that § 1367 does not apply because the federal court lacked jurisdiction over the state law claims); *Fennell v. Stephenson*, 528 S.E.2d 911, 915 (N.C. App. 2000), *review granted and decision pending*, 2000 WL 1269390, 352 N.C. 588 (Aug. 25, 2000)[8] (holding that Congress had power under the Necessary and Proper Clause to enact § 1367(d) and that the provision does not conflict with the Tenth Amendment).

8. The petition does not reflect that the North Carolina Supreme Court has granted review of this intermediate appellate court decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 15 2001
OFFICE OF THE CLERK

(3)

No. 00-1514

In the
Supreme Court of the United States

Lance Raygor and James Goodchild,
Petitioners,

v.

Regents of the University of Minnesota,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITIONERS' REPLY BRIEF

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(1) Respondents insist that the Minnesota Supreme Court did not decide any constitutional question; they assert that that court never held section 1367(d) unconstitutional (R.Br. 1), but merely construed that federal statute to be inapplicable to the instant case. (R.Br. 5, 13).

The constitutional basis of the decision below, however, is absolutely clear:

> We conclude that the application of the tolling provision violates the Eleventh Amendment, because the Eleventh Amendment prohibits Congress from extending the state's liability to suit in state court via the state's unconsented presence in federal court. (App. A-9).
>
> [W]e conclude that application of section 1367(d) to toll the statute of limitations . . . is an impermissible denigration of the University's Eleventh Amendment immunity. (App. A-13).
>
> Extension of the University's exposure to suit in state court because a claim barred by the Eleventh Amendment has been filed against it in federal court is an infringement on the University's Eleventh Amendment immunity. (App. A-14).

In the alternative, respondents suggest that the Minnesota Supreme Court declared section 1367(d) unconstitutional, not "on its face", but only as applied. (R.Br. 4). The decision of that Court, however, undeniably holds section 1367(d) unconstitutional as applied to <u>any</u> state defendant, regardless of the facts of any particular case.

(2) In the court below, respondents advanced an alternative, non-constitutional argument, contending that section 1367(d) does not apply to this case because the federal district court never had subject matter jurisdiction over the state law claim at issue. In their Brief in Opposition respondents appear to suggest that the decision of the

Minnesota Supreme Court actually rested on this ground. (R.Br. 5, 13).

The Minnesota Supreme Court, however, made crystal clear that it was not deciding the case on this basis.

> [T]he [Minnesota] court of appeals determined that when a state law claim asserted in federal court is subject to an Eleventh Amendment immunity defense, the federal court has jurisdiction over that claim until the state defendant successfully asserts the Eleventh Amendment and the claim is dismissed. The University, on the other hand, argues that the Eleventh Amendment automatically bars federal jurisdiction until immunity is waived. We need not answer this quintessentially federal question because, as explained below, our holding is not based on whether jurisdiction temporarily attaches.

(App. A-9)(Footnote omitted).

If the Minnesota Supreme Court had indeed determined that the Eleventh Amendment is an absolute bar to federal jurisdiction, such a decision would be in square conflict with the recent decision of the Ninth Circuit in *Katz v. Regents of University of California*, 229 U.S. 831 (9th Cir. 2000), *cert. denied*, --- U.S. --- (May 14, 2001). In *Katz* the plaintiffs asserted in federal court a claim under the ADEA against a state agency; a jury returned a verdict in favor of the defendant. While the plaintiffs' appeal was pending in the Ninth Circuit, this Court decided *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000). In light of *Kimel* the plaintiffs then asked the court of appeals to dismiss the entire case for lack of subject matter jurisdiction, thus eliminating the *res judicata* effect of the earlier adverse jury verdict, and leaving the plaintiffs free to file a new state law action in state court. The Ninth Circuit concluded, properly in our view, that federal courts do have subject matter jurisdiction over claims against state agencies until and unless the defendant

successfully asserts an Eleventh Amendment defense. 229 F. 3d at 834.

Although respondents might seek to renew this argument as an alternative ground for affirmance, it is clearly insubstantial.

> The Eleventh Amendment . . . does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. . . . Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it.

Wisconsin Dept. of Corrections v. Schacht, 524 U.S. 381,389 (1998). The federal court proceedings in this case were entirely consistent with *Schacht*. When the case was filed in federal district court in August 1996, the University initially opted--as it has in other cases[1]--to litigate the case on the merits. Rather than moving to dismiss, respondents first took and responded to discovery[2] and engaged in mediation. Only after doing so did the University in June1997 decide to assert

---

[1] *E.g., Richmond v. Board of Regents of the University of Minnesota*, 957 F. 2d 595 (8th Cir. 1992)(state discrimination claim not dismissed until Title VII and other federal claims dismissed on summary judgment); *Eldeeb v. University of Minnesota*, 864 F. Supp. 905 (D.Minn. 1994)(No Eleventh Amendment/*Pennhurst* argument asserted; summary judgment sought and granted on merits of state discrimination and negligence claims).

[2] Respondents served 22 interrogatories seeking, among other things, detailed information about petitioners' contentions in their complaints, age discrimination evidence, damages, prior psychological history and therapy, medical providers, employment histories, witnesses, experts, and document identification. Also, respondents served 21 document requests for information about the terms and conditions of employment, income tax returns, resumes, medical records, employment records, damages, personal notes or journals, and documents which supported petitioners' contentions in their complaint. Finally, respondents requested any statements as defined in the Federal Rules of Civil Procedure.

its Eleventh Amendment defense.[3] Under *Schacht* the assertion of that defense certainly did not wipe out, *nunc pro tunc*, the jurisdiction that had existed during the previous year.

(3) Strikingly absent from the Brief in Opposition is any effort to defend or even explain the radical and unprecedented expansion of the Eleventh Amendment adopted by the Minnesota Supreme Court.

This Court has invalidated federal legislation under the Eleventh Amendment only where the federal statute in question attacked directly a state's right to determine whether it would be subject to the coercive process of judicial tribunals at the instance of private parties. *Alden v. Maine*, 527 U.S. 706, 749 (1999). In cases such as this, however, the Minnesota legislature has both chosen to permit suits against state agencies and selected the very judicial forum--state courts--in which petitioners now seek to bring suit. This action was commenced within the requisite 45 days, and Minnesota law certainly permits claims under the Minnesota Human Rights Law to be litigated in federal court, albeit subject to the discretion of a state agency to assert an Eleventh Amendment defense. The only state interest affected here is the tactical advantage a defendant agency might enjoy if plaintiffs were unable even to attempt to bring pendant state claims in federal court. This falls far short of the core state interests at stake in *Alden v. Maine*.

Because section 1367(d) concerns the interrelationship between federal and state claims and courts, the very existence of the federal courts contemplated by Article III entails some incidental impact on the operations of state courts. Some sovereign must establish the procedures to control such interrelated proceedings; either the national government or the

[3]Justice Kennedy has suggested a state which defers in this manner the assertion of its Eleventh Amendment defense may waive that defense. *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. at 395 (concurring opinion).

states must exercise this power, there is no third alternative. The decision of the Minnesota Court arrogates to that state the supreme authority to control the ground rules governing interrelated claims and proceedings, and thus to determine how litigants and even judges must proceed in federal court.

Under the process established by section 1367(d) and the Federal Rules of Civil Procedure, a federal judge is subject to no specific deadlines for determining whether to exercise jurisdiction over a pendant state claim, and ordinarily would not even address that issue until and unless the defendant had filed a motion to dismiss and the plaintiff was accorded an opportunity to respond. Section 1367(d) protects the internal operations of the federal courts by assuring that judges and litigants alike can resolve disputes about pendant state claims in an orderly manner, not driven by the impending expiration of any state limitations periods.

Under the decision below, on the other hand, Minnesota law controls the manner in which these problems must be addressed in the federal courts. Minnesota law cuts off a plaintiff's right to refile in state court a dismissed pendant claim upon the expiration of the applicable state limitation period; that cutoff applies regardless of whether a motion to dismiss has even been filed in federal court, regardless of how little time it would leave the federal judge to rule on a motion to dismiss, and regardless of whether it would expire before any federal appeal could be taken. In the instant case state law requires the filing of an action under the Minnesota Human Rights Act within 45 days after the issuance of a right to sue letter; even if a plaintiff filed a federal action on the very first day, it would be virtually impossible for a federal judge to hear and resolve in the short period that remained any disputes about pendant state claims. Nothing in this Court's Eleventh Amendment jurisprudence has suggested that either the terms of that Amendment or the priciniples of federalism accord to the states the right to interfere in this manner with the internal operations of the federal courts.

Dated: May 15, 2001

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No. 00-1514

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Lance Raygor and James Goodchild,
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ON WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

JOINT APPENDIX

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Certiorari Granted: June 4, 2001

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OPT: CIVIL AUTOMATED TRACKING SYSTEM

06/12/01

TRX: 6HI **RETRIEVE** CASE HISTORY 08:54:27

KEY: DCEM97-013037 SS$586

CASE #: DC EM 97-013037 DATE FILED: 08 21 97

SJIS # : 2702 4 234737

JUDICIAL OFF: NEVILLE C L STATUS: CASE CLOSED

AMOUNT: 0

OTHER JUD OFF: APP PARTY:

TITLE:

RAYGOR, LANCE, VS. UNIVERSITY OF MINNESOTA

** MORE **

DATE	ACTIVITY	FILING / RESULTS COMMENTS
08 21 97		ANSWER AND CERTIFICATE OF REPRESENTATION AND PARTIES FILED
08 27 97	JUD OFF ASSGNED	JUD OFF INITIALLY ASSIGNED
08 27 97	CLERICAL	NOTICE OF JUD OFF ASSNMNT REQSTD
10 15 97		NOTICE OF MOTION AND MOTION, AFFIDAVIT AND MEMORANDUM FILED TO STAY ACTION; OF MATTHEW E. JOHNSON; DEFENDANT'S OF LAW IN SUPPORT OF ITS MOTION TO STAY ACTION*
10 21 97		INFORMATIONAL STATEMENT FILED DEFT (U)
10 22 97		MEMORANDUM FILED OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR STAY, PLAINTIFFS'
10 29 97	CLERICAL	ORDER SIGNED - CASE CLOSED

OPT: CIVIL AUTOMATED TRACKING SYSTEM

06/12/01

TRX: 6HI **RETRIEVE** CASE HISTORY 08:54:39

KEY: DCEM97-013037 SS$586

CASE #: DC EM 97-013037 DATE FILED: 08 21 97

SJIS # : 2702 4 234737

JUDICIAL OFF: NEVILLE C L STATUS: CASE CLOSED

AMOUNT: 0

OTHER JUD OFF: APP PARTY:

TITLE:

RAYGOR, LANCE, VS. UNIVERSITY OF MINNESOTA

** MORE **

DATE	ACTIVITY	FILING / RESULTS	COMMENTS
10 29 97	COMMENTS	MOTION TO STAY GRANTED	
10 30 97		ORDER FILED (MULTIPLE) (NEVILLE)	
11 03 97		SUMMONS AND COMPLAINT FILED (PLTF)	
11 03 97		MEMORANDUM FILED OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR STAY, PLAINTIFFS'	
11 03 97		INFORMATIONAL STATEMENT FILED PLAINTIFFS' (U)	
09 02 98		NOTICE OF MOTION, MOTION, MEMORANDUM FILED IN SUPPORT OF MOTION TO LIFT STAY (PLF)	
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12 01 98	LETTER FILED FROM JUDGE NEVILLE DATED 12-1-98
12 01 98	LETTER FILED FROM ANDREW PARKER DATED 11-17-98
12 31 98	ORDER FILED LIFTING STAY (NEVILLE)
02 02 99	NOTICE OF MOTION AND MOTION, AFFIDAVIT AND MEMORANDUM FILED FOR SUMMARY JUDGMENT; OF MATTHEW E. JOHNSON; DEFENDANT'S OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT*

OPT: CIVIL AUTOMATED TRACKING SYSTEM

06/12/01

TRX: 6HI **RETRIEVE** CASE HISTORY 08:55:22

KEY: DCEM97-013037 SS$586

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SJIS # : 2702 4 234737

JUDICIAL OFF: NEVILLE C L STATUS: CASE CLOSED

AMOUNT: 0

OTHER JUD OFF: APP PARTY:

TITLE:

RAYGOR, LANCE, VS. UNIVERSITY OF MINNESOTA

** MORE **

DATE ACTIVITY FILING / RESULTS COMMENTS

02 18 99		MEMORANDUM FILED	

	OF LAW IN OPPOSITION TO DEF'S SUMMARY JGMT MOTION
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05 28 99	ORDER AND MEMORANDUM FILED (NEVILLE)
06 24 99	NOTICE OF APPEAL TO COURT OF APPEALS FILED PLTFS
06 24 99	BOND FILED COST ON APPEAL
06 29 99	JUDGMENT ENTERED AND ROLL FILED (NON-DOCKETED) (RE: ORDER FILED 5-28-99)

OPT: CIVIL AUTOMATED TRACKING SYSTEM 06/12/01

TRX: 6HI **RETRIEVE** CASE HISTORY 08:55:31

KEY: DCEM97-013037 SS$586

CASE #: DC EM 97-013037 DATE FILED: 08 21 97

SJIS # : 2702 4 234737

JUDICIAL OFF: NEVILLE C L STATUS: CASE CLOSED

AMOUNT: 0

OTHER JUD OFF: APP PARTY:

TITLE:

RAYGOR, LANCE, VS. UNIVERSITY OF MINNESOTA

** MORE **

DATE	ACTIVITY	FILING / RESULTS	COMMENTS
06 29 99		NOTICE OF APPELLATE CASE NUMBER FILED CX-99-1069	
06 29 99	CLERICAL	NOTICE OF JGMT ENTERED REQUESTED	
07 06 99		NOTICE OF APPEAL TO COURT OF APPEALS FILED PLTFS	
07 06 99		NOTICE OF APPELLATE CASE NUMBER FILED COST BOND FILED 6-24-99 BY PLTFS	
07 12 99		NOTICE OF APPELLATE CASE NUMBER FILED C1-99-1140	
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07 30 99		ORDER FILED SUPREME COURT (BLATZ) PLTFS' PETITIONS DENIED	

08 10 99 REQUEST FOR FILE FROM THE COURT OF APPEALS FILED

OPT: CIVIL AUTOMATED TRACKING SYSTEM 06/12/01
TRX: 6HI **RETRIEVE** CASE HISTORY 08:55:40
KEY: DCEM97-013037 SS$586

CASE #: DC EM 97-013037 DATE FILED: 08 21 97
SJIS # : 2702 4 234737
JUDICIAL OFF: NEVILLE C L STATUS: CASE CLOSED
AMOUNT: 0
OTHER JUD OFF: APP PARTY:
TITLE:
RAYGOR, LANCE, VS. UNIVERSITY OF MINNESOTA
** MORE **

DATE	ACTIVITY	FILING / RESULTS COMMENTS
08 18 99		FILE SENT TO THE COURT OF APPEALS
08 27 99		APPELLATE/SUPREME COURT RECEIPT FILED
01 14 00		APPELLATE COURT OPINION (KLAPHAKE) REVERSED, FILED
03 30 00		ORDER FILED SUPREME COURT (BLATZ) DEFT'S PETITION GRANTED!
05 15 00		NOTICE OF MOTION AND MOTION FILED
02 15 01		SUPREME COURT JUDGMENT (BLATZ) AFFIRMED, FILED
02 16 01		FILE RETURNED FROM THE COURT OF APPEALS

SC-C1-99-001140 Appeal from Judgment
Orig co. **Hennepin** Date Filed: **07/07/1999**
Lance Raygor, et al., Respondents, vs. University of Minnesota, a Minnesota State University, petitioner.
Appellant. *

Date	Activity	Start/End	Judge	Crt Rm Continuance
_ 07071999	Case Filed	02:34 02:34	C Neville	
	NOA; Jdugment 6-29-99, w/s 7-2M			
_ 07071999	Case Stmnt	02:35 02:35		
	APL: no tran; ORAL REQ; formal brief. w/s 7-2M			
_ 07071999	Clerical	02:35		
	Per cover letter with appeal: CX-99-1069 was dismissed as premature so filing fee transfers to this appeal			
_ 07071999	Accel Rvw	06:48		
	Petition for accelerated review-H.Bolter w/s 7-2M distributed			
_ 07081999	Remedy Rvw	10:25		
	Filing fee filed for PAR from H. Bolter.			
_ 07141999	Clerical	11:04		
	Notice regarding oral args from A. Parker. C:CLL			
_ 07141999	Cal Rdy Cm	11:05		
	A. Parker, atty for RSP, not avail 10/25-11/5. H. Bolter, atty for APL, not avail 8/13,20; 9/23,30.			

_ 07141999 Clerical 11:06
Notice regarding oral args from H. Bolter. C:CLL
_ 07151999 Clerical 11:09
Rec'd cc of 5-28 Order for judgment
_ 07281999 Answer Fld 10:58
Response to pet. for accelerated review-M. Johnson w/s 7-26M
_ 07281999 Adjudicate 02:39 K Blatz Mtn Denied
Petitions of Lance Raygor and James Goodchild for acceleratd review of this matter are denied.
_ 07301999 Order 01:04 E Toussaint
By 8/9 APL to file cc of 6/29/99 jdg appealed.
Failure to comply may result in sancs, incl dismissal.
_ 08041999 Remedy Rvw 12:11
Rec'd cc 6-29 jdg appealed
_ 08061999 Apl Brief 03:26
H. Bolter, w/s 8/6 P F
_ 08231999 Files-Exhb 04:44
TC file rec'd from Lower Court. –A5–
_ 09081999 Rsp Brief 10:35
A. Parker, w/s 9/7 M F
_ 09171999 Stat Rview 03:19
_ 10211999 Oral Arg 10:05 Panel 618-X 100
_ 10221999 Opin Assgn 03:01 R Klaphake
_ 12091999 Or/Op Circ 10:12 R Klaphake
_ 01042000 Opn Signed 12:28 R Klaphake
_ 01112000 Opin Relsd 01:07 R Klaphake
Reversed
_ 02102000 Ptn Review 10:51
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_ 02112000 Info Revw 11:12

Aff of serv filed for pfr by L. Gildea.
_ 02292000 Answer Fld 02:03
Response to petition for review-H. Bolter w/s 2-29-00 (P).
_ 03282000 Adjudicate 08:42 R Blatz Mtn Granted
Petition for review-L. Gildea is granted & briefs are due.
_ 03282000 Fld New Jr 08:42
PFR granted 3-28-00
_ 03292000 Dst Pt Rvw 08:26
_ 04142000 Clerical 02:07
Ltr. from H. Bolter re: he will be unavailable for oral arg. May 31; June 1, 23; July 3; Aug. 18 p.m.; Aug. 29-Sept. 1; Oct. 9; Nov. 24; Dec. 22, 29.
_ 04272000 Apl Brief 09:41
L. Gildea, w/s 4/27 P F

Next_____ FC__ 01 02 03 04 06 10 12

SC-C1-99-001140 Appeal from Judgment
Orig co. **Hennepin** Date Filed: **07/07/1999**
Lance Raygor, et al., Respondents, vs. University of Minnesota, a Minnesota State University, petitioner. Appellant. *

Date	Activity	Start/End	Judge	Crt Rm Continuance
_ 05232000	Clerical	10:42		

Ltr. from L. Gildea re: she will be unavailable for oral arg. June 15-30 and July 24-31.

_ 05262000 Rsp Brief 01:18
H. Bolter w/s 5/26 P F
_ 06022000 Apl Reply 12:33
L. Gildea, w/s 6/2 P
_ 08012000 Scdl EnBNO 08:39
_ 08282000 En Banc Or 01:07 K Blatz
_ 10022000 Clerical 03:56
Ltr. from L. Gildea w/two decisions relevant to this case.
Distributed
_ 10042000 Clerical 01:16
Recieved Ltr of H. Bolter w/U.S. COA Decision for the 8th Circuit attatched.
_ 11162000 Or/Op Circ 10:24 K Blatz
_ 01042001 Opin Relsd 01:20 K Blatz
Reversed
_ 01192001 Notice 12:05
Notice of taxation of posts of APL in the amount of $1067.15 filed by L. Gildea w/s 1-18M
_ 02122001 Ent Jdgmnt 01:44
_ 02132001 Clerical 03:49
TC file returned to lower court.
_ 03262001 Clerical 11:34
Satisfaction of judgment filed in the amount of $1067.15
_ 04102001 NOA-US SC 09:55
Copy of ltr of US Supreme Court to Atty General of the US: pet for writ of cert placed on 4/2/01 docket; No. 00-1514
==========Pending Activities==========
10102001 DSO-US SC
US Supreme Court notice rec'd 4/10/01.

02122002 Archive

**** END OF INFORMATION ****

NOTATION OF OMITTED OPINIONS, DECISIONS, JUDGMENTS, AND ORDERS

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Aug 13 2001

(5)

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QUESTION PRESENTED

Is the tolling provision of 28 U.S.C. § 1367(d), insofar as it applies to a state defendant, unconstitutional?

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OPINIONS BELOW

The January 4, 2001 opinion of the Minnesota Supreme Court is reported at 620 N.W. 2d 680 (Minn. 2001) and is set out at pp. A1-A15 of the Petition Appendix. The January 11, 2000 opinion of the Minnesota Court of Appeals is reported at 604 N.W. 2d 121 (Minn. Ct. App. 2000) and is set out at pp. A16-A26 of the Petition Appendix. The June 29, 1999 decision of the Hennepin County District Court, which is unreported, is set out at pp. B1-B13 of the Appendix to this brief. The related July 11, 1997 order of the United States District Court for the District of Minnesota, which is not reported, is set out at p. A39 of the Petition Appendix.

JURISDICTION

The Minnesota Supreme Court decision was filed on January 4, 2001. The petition for writ of certiorari was filed on March 30, 2001. This Court granted certiorari on June 4, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Section 1367 of 28 U.S.C. provides in pertinent part:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

* * *

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if-

* * *

(3) the district court has dismissed all claims over which it has original jurisdiction.

* * *

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

Section 363.14(1) of the Minnesota Statutes provides in pertinent part that "a person may bring a civil action . . . within 45 days after receipt of notice that the commissioner has dismissed a charge."

STATEMENT OF THE CASE

This is an action involving age discrimination against two employees of the University of Minnesota. The complaint alleged that in December 1994, University officials attempted to compel petitioners, then both fifty-two, to accept early retirement because of their age. When petitioners refused to retire, according to the complaint, they were subjected to a variety of discriminatory actions both because of their age and in retaliation for that refusal. That discrimination included reclassifying their positions in a manner that reduced their annual salaries by approximately $15,000. No employees under the age of 40 were mistreated in the same manner.

Petitioners filed with the EEOC a charge alleging discrimination in violation of the Age Discrimination in Employment Act. Under a worksharing agreement, the EEOC then cross-filed the charge with the Minnesota Department of Human Rights, because the facts alleged also constituted a violation of the Minnesota Human Rights Act ("MHRA"). On June 6, 1996, the EEOC issued a right to sue letter, advising petitioners that they could file an action under the ADEA within 90 days. On July 17, 1996, the Minnesota Department of Human Rights also issued a right-to-sue letter, and advised petitioners that they could file an action under the MHRA within 45 days. (Pet. App. A18).

On August 30, 1996, petitioners commenced actions against the University in federal district court.[1] The complaints alleged both a federal cause of action under the ADEA[2] and a state cause of action under the MHRA. Respondent's answers, filed in September 1996, set out eight affirmative defenses, one of which was that the complaint "is barred in whole or in part by Defendant's Eleventh Amendment immunity." (Answer, p. 2 ¶ 11). The University, however, did not at that point ask the district court to dismiss any portion of the complaints on that basis; instead, it initially proceeded to litigate the cases on the merits. The parties agreed on, and the district court ordered, a scheduling plan under which all discovery was to be completed by May 30, 1997, and dispositive motions were to be filed by July 15, 1997. The University took and responded to discovery[3], and engaged in mediation.

On April 7, 1997, a district judge in an unrelated case in the District of Minnesota issued a decision holding that the ADEA, insofar as it authorized an action in federal court

[1] Initially Raygor and Goodchild filed separate but essentially identical federal complaints. Their cases were eventually consolidated.

[2] At the time the complaint was filed, none of the appellate decisions that led to the decision in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 71-72 (2000) had yet been decided.

[3] Respondents served 22 interrogatories seeking, among other things, detailed information about Petitioners' contentions, evidence, damages, prior psychological history and therapy, medical providers, employment histories, witnesses, experts, and documents. Respondents also made 21 document requests seeking income tax returns, resumes, medical records, employment records, and personal notes and journals. Finally, respondents requested any statements as defined in Rule 26(b)(3) of the Federal Rules of Civil Procedure.

against a nonconsenting state, was unconstitutional[4]. *Humenansky v. Board of Regents of the Univ. of Minnesota*, 958 F. Supp. 439 (D.Minn. 1997). That decision presaged this Court's later decision in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000). On May 14, 1997, counsel for the University and the two plaintiffs in the instant case filed a stipulation advising the court that the defendant "intends to bring a motion to dismiss the above-captioned actions pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that the Eleventh Amendment to the United States Constitution bars Plaintiffs' ADEA claims." (Stipulation and Order Concerning Scheduling, p. 2). The stipulation made no mention of petitioners' state law claims under the MHRA. The stipulation included several proposed scheduling changes, including a requirement that the motion be filed prior to July 1, 1997.

The University served its motion to dismiss and supporting memorandum of law on June 3, 1997.[5] In addition to attacking the constitutionality of the ADEA, the defendant's memorandum of law also objected that petitioners' state law claims under the MHRA were barred by the Eleventh Amendment. (Memorandum of Law in Support of Motion to Dismiss, pp. 8-9). In response, petitioners acknowledged the state's "potential Eleventh Amendment immunity from state discrimination claims in Federal Court." Petitioners urged, however, if the federal ADEA claims were upheld, that the district court then retain jurisdiction over the

[4] Minnesota has since enacted legislation waiving its immunity from suit in federal court with regard to the ADEA and several other federal statutes. Minn. Stat. §1.05 (2001).

[5] Under local practice the motion and memorandum were not filed until early July, 1997.

supplemental state claims in order to avoid requiring "refiling of state claims in State Court with a federal claim based upon the same fact situation pending in Federal Court." (Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss, p. 9 n. 8). The University in response did not indicate whether it would still want the federal court to dismiss the state law claims if the federal claims were upheld, and it raised no questions regarding the permissibility of filing those state law claims in state court[6].

On July 11, 1997, the district court dismissed petitioners' federal and state claims "without prejudice." Petitioners appealed to the Eighth Circuit on July 14, 1997. The parties agreed that the federal appeal should be held in abeyance pending the circuit court's determination of the already pending appeal in *Humenansky*, and the court of appeals so ordered. *Humenansky* was decided by the Eighth Circuit on August 11, 1998; the court of appeals concluded that the ADEA could not constitutionally subject a nonconsenting state to suit in federal court. 152 F. 3d 812 (8th Cir. 1998), *cert. denied*, 528 U.S. 1114 (2000). A petition for rehearing in *Humenansky* was denied on November 18, 1998. In December 1998, petitioners asked the court of appeals to continue to hold their appeal in abeyance, noting that the United States had by then filed a petition for certiorari in *Kimel*. Although the University opposed further delay, the Eighth Circuit granted that request. Finally, in January 2000, following this Court's decision in *Kimel*, the

[6] The only comment on this issue in the University's memorandum was the assertion that "[P]laintiffs have conceded that the Eleventh Amendment bars their MHRA claim." (Defendant's Reply Memorandum of Law, p. 8).

Eighth Circuit granted petitioners' motion to dismiss their long pending appeal.

In the meanwhile, however, proceedings had begun in state court. On July 31, 1997, three weeks after the dismissal of their federal action, petitioners filed the instant case in Hennepin County District Court alleging a cause of action under the MHRA. The University's answer asserted several affirmative defenses, including that "[P]laintiff's claims are barred, in whole or in part, by the doctrine of election of remedies" and that "[P]laintiff's claims are barred, in whole or in part, by the applicable statute of limitations." (Answer, p. 3, ¶¶ 20, 21).

The University, however, did not initially seek dismissal on either of those grounds. Rather, it asked the state court to stay all proceedings pending disposition by the Eighth Circuit of the federal appeal. The University noted that the allegations of the state lawsuit were "identical" to those in the federal action, and argued, "[t]he University should not be required to defend against Plaintiffs' claims in more than one forum."[7] If petitioners' federal claims were ultimately reinstated, the University insisted, "Plaintiffs may elect to pursue their claims in either federal court or state court, *but not both*."[8] Despite petitioners' objections, the state court on October 29, 1997, ordered a stay of all proceedings. In August 1998, following the Eighth Circuit's decision in

[7] Defendants' Memorandum of Law in Support of Its Motion To Stay Action, p. 1; see *id.* at 3 ("Plaintiffs' maintenance of parallel actions requires the University to defend against identical claims in two different forums. Plaintiffs should not be allowed to pursue identical claims in two different forums"), 4 ("the Minnesota Court of Appeals has stated that courts should attempt to avoid 'piecemeal' litigation.")

[8] *Id.* at 5 (Emphasis added).

Humenansky, petitioners filed a motion asking that the stay be lifted. In successfully opposing that motion, the University again suggested that if the federal claim were reinstated, Plaintiffs would not be able to pursue their claims in both federal and state court. "In that event, Plaintiffs would be permitted to pursue their claims in either federal or state court and would presumably elect federal court since that was their forum of choice."[9] The motion to lift the stay was denied. When in December 1998, petitioners again asked the stay be lifted, the University objected that, "it is prejudicial and improper to require defendants to defend [this case] in two courts." Transcript of hearing December 17, 1998, p. 4. Finally, the state court in December 1998, issued an order lifting the stay for the limited purpose of permitting the University to move to dismiss on limitations grounds.

The University moved in February 1999, to dismiss the state action on the ground that it was barred by the 45 day state statute of limitations. In the state district court the University did not challenge the constitutionality of section 1367(d), but instead argued that that provision was inapplicable to the instant case because the federal court had never had subject matter jurisdiction over petitioners' ADEA claim. The state district court held that section 1367(d) did not apply, agreeing that the federal district court had never had jurisdiction over that federal claim. (Br. App. B2-B7).[10] "That a party may raise sovereign immunity based on the

[9] Defendant's Memorandum of Law in Opposition to Plaintiff's Motion to Lift Stay, p. 3.

[10] A page of the state district court opinion was inadvertently omitted from the copy of that opinion printed in the Appendix to the Petition. We have, therefore, reprinted in full the corrected district court opinion as an Appendix to this brief.

Eleventh Amendment as an 'affirmative defense' does not presuppose that the court had jurisdiction over the matter in the first place." (Br. App. B10-B11). With regard to equitable tolling, the court held that "[l]ack of clarity on a question of jurisdiction is sufficient grounds for invoking equitable tolling, particularly where there has been no demonstration of prejudice to the defendant." (Br. App. B8). But the state court held that equitable tolling was not authorized in this case because the court believed it was clear that the federal court had never had jurisdiction over Petitioners' supplemental MHRA claim. (Br. App. B10-B11).

The Minnesota Court of Appeals reversed. Relying on this Court's decision in *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381 (1998), it concluded that the existence of a possible Eleventh Amendment defense to the ADEA claim had not destroyed or vitiated the original jurisdiction of the federal court, at least not before that defense had been "successfully asserted." (Pet. App. A22). Section 1367(d) was therefore applicable to the instant case. With regard to tolling, the court of appeals held that the state district court had also erred in concluding that the Eleventh Amendment "destroys or vitiates subject matter jurisdiction over state law claims." (Pet. App. A23). "Given the lack of clarity in this area, Appellants' decision to file suit only in federal district court was legally sound and not based on their attorney's incorrect interpretation of the law." (Pet. App. A25). The court of appeals concluded that neither party had been prejudiced by the decision to file in federal court, and that any delay "was partly caused by the University's own actions." (Pet. App. A25).

> Perhaps more importantly, the University could have notified Appellants that it would not consent to suit in federal district court, thus allowing Appellants time to file in state court; rather the University waited nine months before asserting its Eleventh Amendment defense.

(Pet. App. A24-A25).

The Minnesota Supreme Court held the tolling provision of section 1367(d) unconstitutional as applied to a state agency (Pet. App. A9-A14), and concluded that the district court's decision to deny equitable tolling was not an abuse of discretion. (Pet. App. A14-A15).

SUMMARY OF ARGUMENT

Section 1367(d) was enacted to resolve a longstanding problem inherent in the existence of supplemental (formerly "pendent") jurisdiction. Claim preclusion principles generally require federal plaintiffs to include in their complaints any related state claims; a failure to do so will often bar a plaintiff from asserting those claims in a state court action. Decisions in numerous states have dismissed state court actions because the plaintiff had failed to attempt to bring the claim in an earlier federal suit. See Brief Appendix. Minnesota requires federal plaintiffs "to at least attempt joinder of their state claims in a federal action." *Buchanan v. Dain Bosworth, Inc.*, 469 N.W. 2d 508, 511 (Minn.Ct.App. 1991).

Claim preclusion has been successfully asserted by state defendants. Even though those defendants could have raised a sovereign immunity defense to any supplemental claim, defendants can and at times do choose not to assert that defense in federal court. *Wisconsin Dept. of Corrections v.*

Schacht, 524 U.S. 381, 389 (1998). Thus the mere availability of that possible defense does not clearly demonstrate that the federal court would not have exercised jurisdiction over the supplemental claim had it been raised.

Where a federal plaintiff does assert a state claim, but the federal court ultimately declines to exercise supplemental jurisdiction, the plaintiff may be barred from bringing a state court action because the state statute of limitations expired while the case was pending in federal court. Prior to 1990 the federal courts attempted to solve this problem in a variety of ways. Some courts retained supplemental jurisdiction over state claims they would otherwise have dismissed. "[E]xpiration of a state limitations period is an important factor for a district court to consider when deciding whether or not to dismiss a pendent claim." *Newman v. Burgin,* 930 F.2d 955, 963 (1st Cir. 1991)(opinion by Breyer, J.). Other courts conditioned dismissal of the supplemental claim on the execution by the defendant of a waiver of its limitations defense. *Financial General Bankshares, Inc. v. Metzger,* 680 F. 2d 768, 778 (D.C.Cir. 1982)(opinion joined by Ginsburg, J.)

Section 1367(d) replaced these differing and at times ineffective judicial solutions with a straightforward provision tolling the state limitations period during the pendency of the supplemental claim. This is similar to the manner in which, prior to 1789, courts of equity would protect litigants if they concluded that an action in equity should have been filed in a court of law. *Anonymous,* 1 Vern. 73, 22 Eng. Rep. 320 (1682). Congress has in other instances stayed the running of state limitations periods where necessary to protect important federal interests. 50 U.S.C. App. § 525.

The sovereign immunity of the states implicitly protected by the Constitution encompasses the right of the states to decide whether, and in what court, they can be sued. Section 1367(d) does not impinge on either of these prerogatives. If a supplemental claim is brought in federal court, and the state chooses to assert its sovereign immunity defense, the federal court will dismiss the claim, compelling the plaintiff to sue in state court if he or she wishes to pursue that state claim. Thus, sovereign immunity's "core concern is not implicated." *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 51 (1994).

The system of supplemental jurisdiction of which section 1367(d) is a part affords an important choice to state defendants; they can decide not to assert their sovereign immunity defense to the supplemental claim, and thus litigate the state claim in the same proceeding as the federal claim, or they can choose to assert that defense and litigate the state and federal claims in separate actions. Section 1367(d) is necessary to assure that plaintiffs are not unfairly penalized where, as frequently occurs, state defendants do not make this choice until after the limitations period has expired.

ARGUMENT

I. SECTION 1367(d) RESOLVED AN IMPORTANT PROBLEM IN THE INTERRELATIONSHIP BETWEEN THE FEDERAL AND STATE JUDICIAL SYSTEMS

A. The Pre-1990 Attempts of the Federal Courts To Solve The Limitations Problem Regarding Supplemental Claims Were Awkward, Inconsistent and Not Fully Effective

The specific situation to which section 1367(d) is addressed derives from the existence of what until 1990 was known as pendent jurisdiction[11]. When an action arising under federal law is filed in a federal court, the "case or controversy" over which that court has jurisdiction encompasses all other claims or matters in dispute between the parties which arise out of the same nucleus of operative facts. *United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966). Most often these supplemental claims are based on a state law applicable to the same events or transaction that are the basis of the federal claim.

A federal plaintiff with a related state claim ordinarily is as a practical matter compelled to include it as a supplemental claim in his or her federal action. The doctrine of claim preclusion bars a litigant from advancing in a second suit claims he or she could have raised in an earlier action. Restatement of Judgments (Second), § 25. Claim preclusion

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[11] In enacting section 1367, Congress used the phrase "supplemental jurisdiction" to encompass what had hitherto been referred to as pendent and ancillary jurisdiction. We use the terminology of the statute, although invariably the issues discussed in this brief involve what prior to 1990 was known as pendent jurisdiction.

applies where the first action was in federal court and the second in state court.

> If a plaintiff has litigated a claim in federal court, the federal judgment precludes relitigation of the same claim in state court based on issues that were or could have been raised in the federal action, including any theories based on state law.

18 Moore's Federal Practice 3d, § 131.21(3)(d)(i), p. 131-50. Thus a plaintiff is generally required to invoke a federal court's supplemental jurisdiction by asserting related state claims. 18 Wright, Miller & Cooper, Federal Practice and Procedure, § 4412 p. 96.[12]

Where a plaintiff has brought a federal action raising only federal claims, most states will not permit the plaintiff to

[12] The Restatement of Judgments (Second) makes just this point:

> "A commences an action against B in a federal court for treble damages under the federal antitrust laws. After trial, judgment is entered for the defendant. A then seeks to commence an action for damages against B in a state court under the state antitrust law grounded upon substantially the same business dealing as had been alleged in the federal action. Even if diversity of citizenship between the parties did not exist, the federal court would have had 'pendent' jurisdiction to entertain the state theory. Therefore *unless it is clear* that the federal court would have declined as a matter of discretion to exercise that jurisdiction (for example, because the federal claim, though substantial, was dismissed in advance of trial), the state action is barred."

Section 25, comment 3, illustration 10 (emphasis added).

This rule is consistent with the standard for determining what state claims fall within a court's supplemental jurisdiction. Under *Gibbs* state law claims fall within that jurisdiction when, and precisely because, "a plaintif[f] . . . would ordinarily be expected to try them all in one judicial proceeding." 383 U.S. at 725.

maintain a separate state court action raising related state claims. We set forth in an Appendix to this brief a list of such state decisions[13]. In a number of instances *state agencies* have successfully invoked claim preclusion to bar such state court proceedings, even though a sovereign immunity defense would have been available to them if the state claim at issue had been included in the original federal complaint[14]. State courts have applied claim preclusion because the state defendant might have chosen not to assert that sovereign immunity defense had the state claim been brought in federal court, and that the plaintiff was thus obligated to attempt to do so.[15] Where a plaintiff has included a state supplemental claim in his or her federal action, on the other hand, state courts often will refuse

[13] On a number of occasions plaintiff's attorneys have been sued for malpractice for having failed to include such state claims in federal complaints. E.g., *Pitchell v. Williams*, 55 Conn. App. 571, 739 A. 2d 726 (1999); *Greene v. Payne, Wood and Littlejohn*, 197 A.D.2d 664, 602 N.Y.S.2d 883 (1993).

[14] *Bradley v. Georgia Institute of Technology*, 228 Ga.App. 216, 491 S.E. 2d 453 (1997); *Hall v. State of Hawaii*, 7 Haw. App. 274, 756 P. 2d 1048 (1988); *Shumaker v. Iowa Dept. of Transportation*, 541 N.W. 2d 850 (Iowa 1995); *Carter v. Southeastern Michigan Transportation Authority*, 135 Mich.App. 261, 351 N.W. 2d 920 (1984); *Blazer v. New Jersey Sports and Exposition Authority*, 199 N.J.Super. 107, 488 A. 2d 1025 (1985); *Johnson v. Chaney*, 1999 WL 671248 (Tex. App.-Hous.)(Texas Dept. of Corrections a codefendant); *Sattler v. Bailey*, 184 W.Va. 212, 400 S.E. 2d 220 (1990)(West Virginia Dept. of Public Safety a codefendant).

[15] *Shumaker v. Iowa Dept. of Transportation*, 541 N.W. 2d 850, 853 (Iowa 1995)("Shumaker contends that the court would not have exercised pendent jurisdiction over her state claim because the Eleventh Amendment deprived it of subject matter jurisdiction to consider her state claim. However, the Eleventh Amendment does not raise a matter of subject matter jurisdiction. While it may be raised as a defense, it can be waived by consent or a voluntary appearance, by statute, or by the state's conduct in the suit.")

to permit the filing of a state action raising the state claim until and unless there has been a final determination that the federal courts will not exercise jurisdiction over that state claim.[16]

Minnesota law is particularly strict in this regard. "[T]he whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot . . . split up his claim." *Gulbranson v. Gulbranson*, 408 N.W. 2d 216, 218 (Minn.Ct.App. 1987)(*quoting United States v. California and Oregon Land Co.*, 192 U.S. 355, 358 (1904))[17]. The filing of a federal action will preclude a state court claim arising out of the same transaction or occurrence unless it is "clear" the federal court would not have exercised supplemental jurisdiction over that state law claim[18]. Minnesota courts generally "requir[e] plaintiffs to at least attempt joinder of their state claims to a federal action." *Buchanan v. Dain Bosworth, Inc.*, 469 N.W. 2d 508, 511

[16] E.g., *L.A. Draper & Son, Inc., v. Wheelabrator-Frye, Inc.*, 454 So. 2d 506 (Ala. 1984); *International Games, Inc. v. Sims*, 111 Ill. App. 3d 922, 444 N.E. 2d 736, 67 Ill. Dec. 500 (1982); *City of Los Angeles v. Superior Court*, 149 Cal. Rptr. 320, 324, 85 Cal. App. 3d 143 (Ct. App. 2d Dist. 1978).

Simultaneous litigation of federal and state actions will often be precluded as well by state law regarding claim splitting or election of remedies.

[17] *Hauser v. Mealey*, 283 N.W. 2d 803, 807 (Minn. 1978)("It is well established in Minnesota that a party 'should not be twice vexed for the same cause'"); see *Loo v. Loo*. 520 N.W. 2d 740, 744 n. 1 (Minn. 1994) (disapproving claim splitting); *Matter of Minneapolis Community Dev. Agency*, 359 N.W. 2d 687, 690 (Minn.Ct.App. 1984)(same); *Mattsen v. Packman*, 358 N.W. 2d 48, 50 (Minn. 1984)(same); *Travelers Indemnity Co. v. Vaccari*, 245 N.W. 2d 844, 847 (Minn. 1976)(same).

[18] *Buchanan*, 469 N.W. 2d 508, 511 (Minn. Ct. App. 1991). In deciding whether a state claim should have been included in a federal complaint, Minnesota courts used the common nucleus of operative fact standard applied in federal courts. *Anderson v. Werner Continental, Inc.*, 363 N.W. 2d 332, 335 (Minn. Ct. App. 1985).

(Minn. Ct. App. 1991). Thus the fact that including a supplemental state claim is or may be *possible* under federal law makes such inclusion *mandatory* under Minnesota law.

Where a plaintiff does include that state claim in his or her federal complaint, however, the underlying federal claim may subsequently be dismissed at a point in the litigation when the state law claim has yet to be resolved. If that occurs, the court must decide whether to dismiss the state law claim or to retain jurisdiction over and resolve that claim. If an order of dismissal is entered, that is usually done with the understanding that the remaining state claim will (at least if the plaintiff still wants to pursue it) be resolved in state court. In general "[f]ederal courts should not be over-eager to hold on to the determination of issues that might be more appropriately left to settlement in state court litigation." *United Mine Workers v. Gibbs*, 383 U.S. at 726 n. 15 (*quoting Strachman v. Palmer*, 177 F. 2d 427, 431 (1st Cir. 1949)).[19]

Dismissal of a supplemental claim poses a special problem, however, if the state statute of limitations has run since the commencement of the original federal action. Prior to 1990, the lower courts dealt with this situation in a number of different ways. Some courts refused to dismiss a supplemental claim unless the defendant would first agree to waive the state statute of limitations. The District of Columbia Circuit, in an opinion joined by then Judge Ginsburg, took this approach in *Financial General*

[19] *Gibbs* explained that, even where the underlying federal claim was itself retained, there would be situations in which it would be best if "the state claims [were] dismissed without prejudice and left for resolution to state tribunals." 383 U.S. at 726-27. Dismissal of state law claims, for example, might be preferable where it would "promote justice between the parties, by procuring them a surer-footed reading of applicable law" from state courts. 383 U.S. at 726.

Bankshares, Inc. v. Metzger, 680 F. 2d 768 (D.C.Cir. 1982). Having concluded that it was inappropriate in that case for the district court to exercise supplemental jurisdiction over a common law claim, the appellate court remanded

> with instructions not to dismiss the case until the plaintiff has filed an action in the Superior Court of the District of Columbia and the defendant has filed in that court a record of waiver of any applicable statute of limitations.

680 F. 2d at 778. The Seventh Circuit issued a similar order in *Duckworth v. Franzen*, 780 F. 2d 645, 657 (7th Cir. 1985)(opinion by Posner, J.)[20].

Many courts instead took the position that the expiration of the state limitations period was by itself a reason to retain jurisdiction over the supplemental claim[21]. Some appellate decisions held that retention of such a claim was mandatory if the plaintiff could no longer refile his or her claim in state court[22]. Other decisions adopted a less rigid rule, requiring

[20] Defendants were also required to agree to such waivers in *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F. 2d 414, 430 (11th Cir. 1984)(waiver required by district court); *Saulsberry v. Atlantic Richfield Co.*, 673 F. Supp. 811, 816 (N.D.Miss. 1987), *Brewer for Brewer v. City of El Cerrito*, 666 F. Supp. 1346, 1351 (N.D.Cal. 1987), and *Harkins Amusement Enterprises, Inc. v. Harry Nace Co.*, 657 F. Supp. 1037, 1040 (D.Ariz. 1987).

[21] A number of lower court decisions, without announcing a clear legal standard, relied on this circumstance in deciding to retain jurisdiction over a supplemental claim. E.g., *Hansen v. Lamontagne*, 808 F. Supp. 89, 95 (D.N.H. 1992); *Robles v. Humana Hosp. Cartersville*, 785 F. Supp. 989, 999 (N.D.Ga. 1992); *Kleiner v. First Nat. Bank of Atlanta*, 97 F.R.D. 683, 690 (N.D.Ga. 1983).

[22] *Edwards v. Okaloosa County*, 5 F. 3d 1431, 1435 (11th Cir. 1993)(pre-1990 claim); *Evans & Associates v. Continental Homes*, 785 F. 2d 897, 917 (11th Cir. 1986); *Emory v. Peeler*, 756 F. 2d 1547, 1555

only that the district judge give consideration to the expiration of that limitations period in deciding whether to dismiss the supplemental claim[23]. The First Circuit, in an opinion written by then Judge Breyer, held "that expiration of a state limitations period is an important factor for a district court to consider when deciding whether or not to dismiss a pendent claim." *Newman v. Burgin*, 930 F. 2d 955, 963 (1st Cir. 1991)[24].

Yet a different approach was to dismiss the supplemental claim, but later to entertain a motion to reconsider that

(11th Cir. 1985); *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F. 2d 414, 430 (11th Cir. 1984); *Henson v. Columbus Bank and Trust Co.*, 651 F. 2d 320, 325 (5th Cir. 1981); *O'Brien v. Continental Illinois Nat. Bank & Trust*, 593 F. 2d 54, 63 (7th Cir. 1979); *Hector v. Weglein*, 558 F. Supp. 194, 207 (D.Md. 1982); see *Beck v. Prupis*, 162 F. 2d 1090, 1100 (11th Cir. 1998)(failure to retain jurisdiction where statute of limitations has expired "will often constitute an abuse of discretion.")

[23] *Notrica v. Board of Supervisors of County of San Diego*, 925 F. 2d 1211, 1215 (9th Cir. 1991); *Prater v. United Mine Workers*, 793 F. 2d 1201, 1208 (11th Cir. 1986); *Garner v. Pearson*, 732 F. 2d 850, 854 (11th Cir. 1984); *Transource Intern, Inc. v. Trinity Industries, Inc.*, 725 F. 2d 274, 290 (5th Cir. 1984); *Quality Foods v. Latin Am. Agribusiness Devel.*, 711 F. 2d 989, 999-1000 (11th Cir. 1983); *Ransom v. S & S Food Center, Inc.*, 700 F. 2d 670, 678 (11th Cir. 1983); *Stein v. Reynolds Securities, Inc.*, 667 F. 2d 33, 34 (11th Cir. 1982); *Pharo v. W.L.Smith*, 625 F. 2d 1226, 1227 (5th Cir. 1980); *Finkelstein v. Barthelemy*, 678 F. Supp. 1255, 1261 (E.D.La. 1988); *Haber v. County of Nassau*, 411 F. Supp. 93, 99 (E.D.N.Y. 1976); *Blake v. Town of Delaware City*, 411 F. Supp. 1189, 1204 (D.Del. 1977).

[24] See *Giardiello v. Balboa Ins. Co.*, 837 F. 2d 1566, 1571 (11th Cir. 1988)(limitations bar "an important concern"); *Rodriguez v. Doral Mortgage Corp.*, 57 F. 3d 1168, 1177 (1st Cir. 1995)(existence of statute of limitations bar "a salient factor" in determination whether to retain jurisdiction); *Rutledge v. Aluminum, Brick & Clay Workers Union*, 737 F. 2d 965, 970 n. 7 (11th Cir. 1984)(district courts "encouraged" to retain jurisdiction); *Eisert v. Town of Hempstead*, 1996 WL 50022 * 7 (E.D.N.Y.) (citing *Newman*).

dismissal if the state courts in the interim had rejected the claim on limitations grounds.[25] But plaintiffs who sought to file the state law claim in both federal and state court faced dismissal by the state courts for splitting their claims.[26] A number of the cases in which these issues arose involved state defendants.[27]

This Court dealt with a closely related problem in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988). The complaint in that case had initially been filed in state court; after it was removed to federal court, the plaintiffs withdrew their federal claim. The question at issue was whether the district court should remand the state claim or dismiss it; the distinction was of potentially controlling importance, since the state statute of limitations had by then run. This Court held that the expiration of that limitations period was "a potent reason for giving federal courts

[25] *Rheaume v. Texas Dept. of Public Safety*, 666 F. 2d 925, 931-32 (5th Cir. 1982); *Henson v. Columbus Bank and Trust Co.*, 651 F. 2d 320, 325 (5th Cir. 1981).

[26] See n. 16, *supra*; cf. *Notrica v. Board of Supervisors of County of San Diego*, 925 F. 2d 1211, 1213 (9th Cir. 1991)(state court claim dismissed for lack of prosecution while plaintiff was pursuing federal court action).

The unwillingness of state courts to entertain such duplicative lawsuits is understandable. If plaintiffs filed both federal and state lawsuits but then tried to resolve the issues in the federal proceeding, "[s]tate courts could hold cases on their dockets for years awaiting the outcome of litigation in federal court. Requiring a plaintiff to file in both state and federal court would only undermine *Gibbs'* purpose of promoting judicial economy, convenience and comity." *Edwards v. Okaloosa County*, 5 F. 3d 1431, 1434 (11th Cir. 1993).

[27] E.g. *Notrica v. Board of Supervisors of San Diego*, 925 F. 2d 1211 (9th Cir. 1991)(state of California a co-defendant); *Cooley v. Pennsylvania Housing Finance Agency*, 830 F. 2d 469 (3d Cir. 1987); *Rheaume v. Texas Dept. of Public Safety*, 666 F. 2d 925, 931-32 (5th Cir. 1982).

discretion to remand" such claims. 484 U.S. at 352. The Court also rejected the suggestion that the federal court should simply retain jurisdiction of such removed claims rather than remand them. That solution, it explained, was

> far from satisfying. Under petitioners' suggested approach, district courts would retain jurisdiction over cases that apart from the statute-of-limitations concern properly belong in state courts. There is no reason to compel or encourage district courts to retain jurisdiction over such cases when the alternative of a remand is readily available.

484 U.S. at 352-53 n. 10. But in the more typical case where the complaint had originally been filed in federal court, the alternative of a remand was not available at all.

The alternatives that were available to the federal courts in such cases all had serious drawbacks. The waiver technique was not always successful; a defendant was always free to refuse to agree, because it wanted to stay in federal court or because it hoped the court might relent and dismiss the case anyway[28]. Courts using this approach had to decide what possible defenses would be included in the waiver.[29] In a circuit where expiration of the limitations period was merely one factor bearing on the district judge's decision, the result

[28] E.g., *O'Brien v. Continental Illinois Nat. Bank & Trust*, 593 F. 2d 54, 65 (7th Cir. 1979); see *Knuth v. Eri-Crawford Dairy Cooperative Ass'n*, 325 F. Supp. 48, 57 n. 11 (W.D.Pa. 1971)(defendant, which had not offered waiver at trial, later relented and agreed during oral argument on motion to dismiss supplemental claim).

[29] *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F. 2d 414, 430 (11th Cir. 1984)(retention of jurisdiction required where it appeared that waiver ordered was insufficiently broad).

could vary unpredictably from case to case[30]. In all of these cases, particularly where retention of jurisdiction was at issue, federal judges were required to interpret state limitations law[31]. That sometimes difficult task was compounded where the defendant was assuring the federal judge that there would be no limitations problem[32], while the plaintiff expressed concerns to the contrary.

These varied and imperfect judicial solutions adversely affected both state and federal interests. Retention of jurisdiction, as the Court noted in *Carnegie-Mellon*, meant that cases which belonged in state court would remain in federal court. Federal courts properly concerned not to inadvertently wipe out a plaintiff's claim were retaining jurisdiction over cases merely because it was possible, but not certain, that the state courts would have been unwilling to hear them[33].

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[30] See *Burns-Toole v. Byrne*, 11 F. 3d 1270, 1276 (11th Cir.)(refusal to retain jurisdiction not abuse of discretion despite expiration of limitations period), *cert. denied*, 512 U.S. 1207 (1994).

[31] E.g., *Burrows v. Turner Memorial Hosp., Inc.*, 762 F. Supp. 840, 843-44 (W.D.Ark. 1991)(initial order retained jurisdiction because of limitations problem; later order dismissed supplemental claims after concluding statute of limitations would not actually be a bar); *Green v. Jackson County State Bank*, 1987 WL 14376 * 6 (S.D.Tex.)(noting difficulty in interpreting state law); see n. 33, *infra*.

[32] *Financial General Bankshares, Inc. v. Metzger*, 680 F. 2d 768, 778 (D.C.Cir. 1982).

[33] E.g., *Duckworth v. Franzen*, 780 F. 2d 645, 657 (7th Cir. 1985)(ordering waiver due to "uncertainties" as to whether complex state limitations rules would bar filing in state court); *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F. 2d 414, 430 (11th Cir. 1984)(forbidding dismissal of pendent claims because court "did not know whether [plaintiff] could reassert its state claims in Alabama courts"); *O'Brien v. Continental Illinois Nat. Bank & Trust*, 593 F. 2d 54, 65 (7th Cir. 1979)(retention of jurisdiction required where "it would appear" plaintiff could not refile claim in state court); *Sun Dun, Inc. v. Washington Coca-*

On the other hand, as this Court explained in *Carnegie-Mellon*, the danger that state law claims might ultimately be forfeited because they had been brought as supplemental claims in federal court created a risk of coercing litigants into abandoning their federal claims entirely.

> [I]f a plaintiff . . . knows that, notwithstanding the expiration of a statute of limitations, a federal court . . . must dismiss the case upon deciding that the exercise of pendent jurisdiction would be inappropriate, the plaintiff may well decline to allege any federal-law claims. . . . Such protection will appear especially attractive to a plaintiff who has any doubt about the validity of his federal-law claim.

Carnegie-Mellon, 484 U.S. at 352 n. 9. Litigants might also be reluctant to risk their state law claims by asserting federal claims in federal court where, as here[34], the remedies afforded under state law are more comprehensive. In either circumstance, the risk of a limitations-based forfeiture of state

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Cola Co., 740 F. Supp. 381, 394 (D.Md. 1990)(retaining jurisdiction because statute of limitations "might" bar claim); *Blake v. Town of Delaware City*, 411 F. Supp. 1189, 1204 (D.Del. 1977)(retaining jurisdiction because statute of limitations "might" bar refiling claim in state court); *Meyerhofer v. Empire Fire and Marine Insurance Co.*, 74 F.R.D. 151, 154 (S.D.N.Y. 1977), (district court declined to dismiss pendent claims because "it is uncertain what statute of limitation applies. . . . It would work a harsh injustice on plaintiff . . . if we were to dismiss his claims and it was later determined that he was barred by the statute of limitations because of the time that had elapsed while the case was before us"), *rev'd on other grounds, Federman v. Empire Fire and Marine Ins. Co.*, 597 F. 2d 798 (2d Cir. 1979).

[34] Minnesota law, for example, authorizes compensatory and punitive damages in an age discrimination case. Minn. Stat. § 363.071(2). Neither of those remedies is available under the ADEA.

law claims may "chill . . . plaintiffs from bringing their federal-law claims." *Id.* Such a result was particularly inappropriate where Congress expressly intended that federal and state remedies be complementary. The pre-1990 judicial responses were incapable of avoiding this chilling effect. Because standards varied between and even within circuits, and because of the element of discretion in many appellate opinions, litigants could not be confident that they would not forfeit their state law claims if they attempted to proceed in federal court.

B. Section 1367(d) Provided A Sensible and Balanced Solution to the Problem

In 1990 Congress replaced this mix of ad hoc judicial responses with a single statutory solution[35]. Under section 1367(d) the state statute of limitations is tolled from the commencement of the federal action until the date on which it ends. This affords a plaintiff an opportunity to seek to litigate his or her state law claims in federal court without running the risk that those claims will ultimately be forfeited because of the state statute of limitations.

> It is plainly appropriate, as an aid to the exercise of federal jurisdiction, to see to it that a plaintiff is not discouraged from seeking a federal forum if he believes that such a forum is available. One way to achieve this goal is to assure him that he will not lose his cause of action if his belief turns out to be erroneous. Moreover, it is clearly in the interest of sound judicial administration to adopt a procedure under which a plaintiff need not file simultaneous actions in two courts in order to ensure that his action will not be barred by the statute of limitations following a dismissal in one of them.

American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, pp. 453-54 (1968). Because the protections of section 1367(d) are clear, uniform, and predictable, plaintiffs and defendants alike can anticipate the consequences of raising and opposing supplemental claims. Unlike the court-required waiver, section 1367(d) does not depend for its efficacy on the cooperation of the defendant. And, unlike the practice of retaining supplemental jurisdiction, section 1367(d) eliminates the need for federal judges to keep cases which would otherwise sensibly be left to the state courts.

It is assuredly appropriate for Congress to protect litigants who in good faith seek to enforce their legal rights in federal court. Federal law prohibits retaliation against federal litigants because they sought redress in federal court. 18 U.S.C. § 1513 (retaliation against party or witness). A state law which penalized an individual for seeking federal judicial redress--such as by imposing a forfeiture of any related state law claim against the same defendant--would undoubtedly be invalid. See *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967); cf. 29 U.S.C. § 623(d) (prohibiting employers from retaliating against employees for opposing violations of the

[35] The approach taken by section 1367(d) apparently derives from an earlier proposal adopted by the American Law Institute. Study of the Division of Jurisdiction Between State and Federal Court, pp. 65 , 453-57 (1968). The ALI had suggested that a tolling provision be adopted for all claims initially filed in federal court which that court concluded should have been filed in state court.

The proposal appears to stem from an article by Professor Herbert Wechsler, "Federal Jurisdiction and the Revision of the Judicial Code", 13 Law and Contemp. Probs. 216, 233 (1948).

ADEA). The refusal of state law (or, as here, the refusal of a state judge) to toll a state limitations period while the plaintiff seeks to enforce that state right in federal court, although not the result of any improper motive, will have the same punitive impact as an intentional act of retaliation.

Utilization of a tolling rule is a longstanding solution to the type of problem to which section 1367(d) is addressed. Both federal[36] and state statutes provide for tolling where several different forums are provided in which a party can seek redress. This same solution was available prior to the adoption of the Constitution where a court in equity concluded that a claim before it should have been filed in a court of law, but the underlying limitations period had expired since the commencement of the equitable action. In such cases the equity court would intervene to prevent the limitations bar from precluding the action at law.

> Upon a motion, the Lord Chancellor declared, that if a man sued in Chancery, and pending the suit here, the statute of limitations attached on his demand, and his bill was afterwards dismissed, as being a matter properly determinable at common law: in such case his Lordship would take care to preserve the plaintiff's right, and would not suffer the statute to be pleaded in bar to his demand.

[36] E.g., 8 U.S.C. § 1182(a)(9)(B)(iv) (period of illegal residence in the United States triggering inadmissibility tolled during period of application for change of status); 15 U.S.C. § 6606(e)(4) (limitations period for Y2K action tolled during period of notice and remediation); 28 U.S.C. § 2263(b) (180 day period to file federal habeas petition tolled during pendency of certiorari petition and first state post-conviction proceeding); 29 U.S.C. § 1854(f) (period to file certain actions by farmworkers tolled during pendency of related state workers compensation proceeding).

Anonymous, 1 Vern. 73, 22 Eng. Rep. 320 (1682)[37]. A similar rule existed where an action was originally commenced in an inferior court of law, and later refiled in a law court of greater authority[38]. An analogous practice exists today where a defendant asserts that the court in which an action is filed is a forum non conveniens; where that objection is sustained, the court may require, as a condition of dismissal, that the objecting party waive any statute of limitations or other bars to a new proceeding in the forum deemed more appropriate. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981).

Congress has on other occasions stayed the running of state limitations periods to protect important federal interests. During World War I Congress adopted the Soldiers and Sailors Relief Act, which provided in part that the state limitations periods applicable to the claims of military personnel would

[37] See *Gilbert v. Emerton*, 2 Vern. 503, 23 Eng. Rep. 922 (1705)(Lord Keeper directed "that the plaintiff should bring his action [at law], and the defendant not to insist on the statute of limitations"); *McKenzie v. Marquis of Powis*, 7 Brown 282, 288, 3 Eng. Rep. 183, 187 (1737)(in order dismissing equitable action court directed that in any "action or actions to be brought at law, the respondent . . . shall not be permitted to plead or insist on the statute of limitations"); *Sturt v. Mellish*, 2 Atk. 611, 26 Eng. Rep. 765 (1743)("But if the plaintiff should have a mind to bring an action at law upon the promise pretended to be made . . . , I will direct that the time which has run during the pendency of this suit, shall not be taken advantage of at law.")

[38] Joseph Angell, A Treatise on the Limitation of Actions at Law and Suits in Equity, pp. 322-23 (Boston 1829)("the commencement of an action in an *inferior* court will prevent the statute from attaching to the cause of action. And it has been held, in the court of King's bench, that if an action be commenced in an inferior court, and then removed by *habeas corpus*, and they proceed anew, the commencement serves to prevent the statute. . . . [N]ot that this [King's Bench] suit was a continuance of the suit below, but that the plaintiff had rightfully and legally pursued his right.")

be suspended during the period of their military service. 40 Stat. 440, 443, § 205. A similar provision still protects men and women serving in the armed forces. 50 U.S.C. App. § 525[39]. A related provision was enacted during the Civil War. 13 Stat. 123. The impact of section 1367(d) is significantly more modest than section 525. Under section 1367(d) the tolling period will begin only *after* the defendant has been notified of the commencement of legal proceedings against it, albeit in what ultimately proves to be the wrong court; under section 525, on the other hand, a defendant could be entirely unaware of the continued existence of a tolled claim.

II. SECTION 1367(d) DOES NOT VIOLATE THE SOVEREIGN IMMUNITY OF THE STATES

A. An Act of Congress Can Be Invalidated Only On A Clear Showing That It Violates The Core Concerns of Sovereign Immunity

Although the Minnesota Supreme Court characterized the asserted constitutional flaw in section 1367(d) as a violation of the state's Eleventh Amendment immunity, the constitutional question raised here actually is about sovereign immunity. The two, of course, are closely related; this Court has repeatedly explained that the specific limitation written

[39] Section 525 provides in pertinent part:

"The period of military service shall not be included in computing any period now or hereafter to be limited by any law . . . for the bringing of any action or proceeding in any court . . . by . . . any person in the military service . . . whether such cause of action or right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service."

into the Eleventh Amendment itself was an application of a broader principle of state sovereign immunity widely accepted by the framers of the Constitution and implicit in the original constitutional plan. *Alden v. Maine*, 527 U.S. 706, 723-7 (1999).

The decisions of this Court have in the past recognized a constitutionally protected sovereign immunity where it was clear that the framers of the Constitution had a specific understanding that the state interest in question was one with which Congress would not have the power to interfere. "We seek to discover . . . what the Framers and those who ratified the Constitution sought to accomplish when they created a federal system." *Alden v. Maine*, 527 U.S. at 758. "[T]he ratification debates and events leading to the adoption of the Eleventh Amendment reveal the original understanding of the States' constitutional immunity from suit [and] underscore the importance of sovereign immunity to the founding generation." *Id.* at 726-27. Most importantly, "the *contours* of sovereign immunity are determined by the Founders' understanding." *Alden v. Maine*, 527 U.S. at 734 (Emphasis added).

Applying this demanding standard, this Court has found "clear" (*id.* at 726) and "conclusive evidence" (*id.* at 727) that the framers understood that sovereign immunity protected two specific, identified state interests--the right to decide whether a state could be subject to suit, and the right to determine in which court the state could be sued. *Nevada v. Hall*, 440 U.S. 410, 414 (1979). "A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984). (Emphasis original). Regarding both suits against a nonconsenting state in

federal court, and suits against a nonconsenting state in state court, this Court concluded that "it is difficult to conceive that the Constitution would have been adopted if it had been understood to strip the States of immunity from suit in their own courts", *Alden,* 527 U.S. at 727, or to subject the states generally to suit in federal court. *Id.* at 727 (*quoting Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239 n. 2 (1985)). Thus this Court has found a state's constitutional immunity to be implicated only where a nonconsenting state was named as a defendant in federal[40] or state[41] court, or where a nonconsenting state was the real party in interest in an action in which the nominal defendant was an individual[42]. This Court cautioned in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979), that there was "no justification for reading additional meaning into the limited language of the [Eleventh] Amendment."

The care with which this Court has delineated the scope of the interests protected by a state's constitutional sovereign immunity stems in part from the fact that the text of the Constitution itself provides no guidance. "[T]he constitutional principle of sovereign immunity . . . is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution." *Alden v. Maine*, 527 U.S. at 730. Constitutional principles that were only implicit in the system of federalism may be as important as explicit

[40] *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985); *Hans v. Louisiana*, 134 U.S. 1 (1890).

[41] *Alden v. Maine*, 527 U.S. 706 (1999).

[42] *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984); *Edelman v. Jordan*, 415 U.S. 651 (1974).

constitutional text, but they are assuredly more difficult to define and delineate.

This case involves neither Minnesota's right to decide whether it can be subjected to suit, nor its right to determine where such a suit may be litigated. Section 1367(d) assuredly is not the "functional equivalent" of a federal law authorizing suits against a nonconsenting state in federal or in state court. See *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 282 (1997). Rather, the question here is whether federal procedural provisions of general application and of otherwise unquestioned validity may be unconstitutional when applied to a state agency.

B. The System of Federal Supplemental Jurisdiction Of Which Section 1367(d) Is A Part Respects The Core Concerns of Sovereign Immunity

The scope of federal supplemental jurisdiction itself has been construed in a manner consistent with the two established aspects of state sovereign immunity. *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 117-23 (1984). First, if a state chooses not to allow any suits against state agencies or entities, federal supplemental jurisdiction does not provide a basis for suing the nonconsenting state in federal court. Second, if a state has chosen to permit such actions but to allow them only in state court, federal courts cannot exercise supplemental jurisdiction over the objections of the state. In both instances the state need only assert its immunity defense in a manner and at a time consistent with federal procedure. If a federal complaint includes a supplemental claim against such a state, the state can readily obtain prompt dismissal of that claim simply by filing an

appropriate motion under Rule 12(b)(6). Thus "the Eleventh Amendment's core concern is not implicated." *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 51 (1994).

Supplemental jurisdiction, however, also affords to the state a third type of choice, one which only the federal law could create. Where Congress has created a federal cause of action arising out of the same circumstances as a state law claim against a state defendant, the existence of supplemental jurisdiction usually means that the states will have two options; the state can either litigate the state law claims together with related federal claims in federal court, or assert a sovereign immunity defense to the state law claims and force the plaintiff to pursue them in state court[43].

> The Eleventh Amendment . . . does not automatically destroy original jurisdiction. Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. . . . Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it.

Wisconsin Dept. of Corrections v. Schacht, 524 U.S. 381, 389 (1998). Indeed, unless a state has chosen to raise the matter, a federal court could not dismiss a claim on sovereign immunity grounds.[44] So long as its choice is exercised in conformity

[43] Supplemental jurisdiction often effectively requires plaintiffs to either include supplemental state law claims or abandon them; anti-claim splitting rules, election of remedies and claim preclusion principles and the burdens of having to litigate related claims in two different courts will usually leave plaintiffs with little alternative.

[44] The state district court erred in concluding that "under *Pennhurst* it was clear the federal district court could not exercise jurisdiction over the supplemental MHRA claims." (Pet. App. A-14). Until and unless

with federal procedure, the selection of the forum in which the state claim will be heard is left entirely to the discretion of the state.

A state may prefer to defend a supplemental state claim in federal court to avoid the expense and inconvenience of having to try the federal and state claims in separate proceedings. That option may also be attractive where state law claims will in any event be tried in federal court against other defendants; by acquiescing in the adjudication by the federal court of the supplemental claims against the state as well, the state may be able to share the burdens of litigation with counsel for the other defendants, and be able to avoid the risk that, in the absence of a joint defense, the federal court defendants might make litigation decisions contrary to the interests of the state in the parallel state court action. The assertion of a supplemental claim against a state accords the state the option of taking advantage of these benefits, or of rejecting them and insisting that the plaintiff pursue the proposed state claim in state court.

Federal practice also affords the state an opportunity to postpone deciding whether to assert its sovereign immunity defense until it is clear whether the federal claim will survive

the University actually sought dismissal on the basis of its sovereign immunity defense, the exercise of such jurisdiction was entirely proper. "[T]he State's participation as a defendant would not automatically have placed the [claim] outside the federal courts' jurisdictional authority. That is because . . . the State might not have asserted the [sovereign immunity] defense in federal court, but could have decided instead to defend on the merits." *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 390 (1998). "The [Eleventh] Amendment . . . enacts a sovereign immunity from suit, rather than a nonwaivable limit on the Federal Judiciary's subject-matter jurisdiction." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 266 (1997).

to trial.[45] Federal law might, for example, have required a state defendant to decide within 30 days of the filing of the complaint whether to assert its sovereign immunity defense. See 28 U.S.C. § 1447(c). That would have forced a state to exercise its option before it knew whether relinquishing that defense was actually necessary to avoid defending related claims in both federal and state courts. But under *Gibbs* and section 1367(c)(3) the federal courts generally reconsider whether to retain jurisdiction over a supplemental claim if the underlying federal claim is dismissed.

States in theory might make by statute the choices accorded to them by federal supplemental jurisdiction, enacting legislation that requires state lawyers to object to all supplemental claims against the state, or that forbids them from ever doing so. At least ordinarily, however, state laws leave to the attorneys representing state agencies the authority to decide in each case whether the interests of the state would be better served by objecting to or acquiescing in the exercise of supplemental jurisdiction over a given claim against the state. Thus the University of Minnesota has chosen in some instances to defer asserting sovereign immunity until after the dismissal of the underlying federal[46] claim, and in others to seek a decision on the merits of both the federal and supplemental claims[47]. In *Katz v. Regents of University of*

[45] In *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 393-98 (1998), Justice Kennedy suggested that a state could not defer asserting its sovereign immunity until after a decision on the merits had been rendered against it in the trial court.

[46] *Richmond v. Board of Regents of the University of Minnesota*, 957 F. 2d 595, 599 (8th Cir. 1992).

[47] *Eldeeb v. University of Minnesota*, 864 F. Supp. 905, 908 (D.Minn. 1994).

California, 229 F. 3d 831 (9th Cir. 2000), *cert. denied*, 121 S.Ct. 1989 (May 14, 2001), the state defendant won a jury verdict on both the federal and supplemental claims, and then successfully resisted the plaintiff's argument that there had been no federal jurisdiction over the latter. In practice state defendants in a wide variety of circumstances have chosen to litigate in federal courts supplemental claims related to federal claims that were in any event going to be tried there. (See Petition for Writ of Certiorari, pp. 10-11 and nn. 3-11).

In the instant case the University of Minnesota took full advantage of the tactical opportunities accorded by federal law. At the beginning of the litigation, before developments in the law called into question the viability of the federal ADEA claim, the defendant made no active effort to assert sovereign immunity or to force litigation of the state law claims into state court. Rather, counsel for the University engaged in extensive discovery, and was litigating the state and federal claims together. Only when, following the decision in *Humenansky*, the defendant moved to dismiss the federal claim, did the defendant actually ask the federal court to dismiss the supplemental claim because of sovereign immunity[48]. If the constitutional issue in *Humenansky* and

[48] The Minnesota Supreme Court somewhat mischaracterized the events below when it asserted, "[t]he University did not consent; instead, it asserted Eleventh Amendment immunity as an affirmative defense in its answer in the federal court, and later as a basis for the motion to dismiss in federal court." (Pet. App. A10). As the state court of appeals recognized, (Pet. App. A24-A25), the nine months between the answer and the motion to dismiss are of considerable importance. Although the defendant's failure during this period to assert its sovereign immunity defense did not irrevocably waive that defense, the mere filing of an answer with a boilerplate assertion that the complaint was "barred in whole or part" by the Eleventh Amendment did not constitute a serious effort to obtain on that basis dismissal of the supplemental claims.

later *Kimel* had been resolved in favor of plaintiff, it is certainly conceivable--perhaps even likely--that the University would ultimately have withdrawn its effort to shift the supplemental claim out of federal court. All of these tactical decisions were entirely proper; the University was simply utilizing the choices provided by federal law in the same manner many defendants would have chosen.

However, the discretion that federal law accords to state defendants in asserting a sovereign immunity defense carries with it the very problem that section 1367(d) in turn addresses. A legal regime in which state defendants are permitted to and do decide only *after* the filing of a complaint whether to oppose or acquiesce in the exercise of supplemental jurisdiction is necessarily one in which the plaintiffs cannot know at the time of the filing of the complaint whether or not they will be able to litigate that claim in federal court. Petitioners received their right to sue letters in June and July, 1996, and were required to decide by the end of August 1996 whether to file their state law claim in federal or state court. Not until the spring of 1997, however, did the University decide to be a nonconsenting state defendant, and not until its June 1997 motion did the University actually request dismissal of the supplemental state claim. The University's motion occurred many months after the expiration of the state statute of limitations.

C. A State's Constitutionally Protected Sovereign Immunity Is Not Implicated Merely Because A Federal Statute May "Affect" The Outcome of An Action To Which The State Has Consented

Section 1367(d) does not interfere with the ability of a state to determine whether, or in what court, it may be subject to suit. The Minnesota Supreme Court, however, believed that the Constitution would be violated by any federal law that would in any way "affect the liability of the University as to a state law claim in state court." (Pet. App. A9-A10). This sweeping statement finds no support in the decisions of this Court, which until now have identified as constitutionally protected only a state's authority to determine whether and in what court a state could be sued.

The very existence of supplemental jurisdiction can "affect the liability" of a state agency, since often it will as a practical matter force the state to agree to federal jurisdiction--with its different practices and procedures--to avoid duplicative trials. Even where the state insists that the state claims be litigated in state court, the ongoing federal proceeding may have a substantial, perhaps even dispositive impact. Testimony elicited or documents discovered in the federal proceeding against a state agency or individual state officials, for example, might prove determinative in a later state law action against the agency. A successful action in federal court may collaterally estop the state defendant from asserting factual or legal defenses in the state court action.

The decisions of this Court have only invalidated acts of Congress based on a far more serious interference with state sovereign immunity. *Alden v. Maine* struck down congressional efforts to force the state courts to hear FLSA

cases against a state on the ground that in 1789 there was a specific identifiable legal tradition protecting the authority of a sovereign to make that decision itself. 527 U.S. at 713, 724, 728. No such tradition, however, exists with regard to tolling rules or statutes of limitations, and there is no showing here--as there was in *Alden*--that the issue in this case was one the framers actually had in mind, or about which their reaction is at all knowable. The solution adopted by Congress to solve the problem in this case is the same solution that had existed in 1789 to deal with the analogous problem regarding courts of law and courts of equity. It is scarcely to be believed that ratification of the Constitution would have been imperiled by a suggestion that Congress might be authorized to adopt legislation such as section 1367(d).

The specific question at issue here--whether the limitations period in this case should have been tolled while the federal supplemental claim was pending--can hardly be characterized as an issue about sovereign immunity. The state statute allowing actions to be brought against state agencies under the Minnesota Human Rights Act says nothing about tolling one way or the other. There is not even a state statute forbidding tolling with regard to state agencies or defendants generally; to the contrary, state law clearly accords to state district judges discretion to toll statutes of limitations. (Br. App. B7-B11; Pet. App. A14, A24-25). The decision of the state trial judge to refuse to toll the limitations period appears to have rested, not on any application of state law, but on a misunderstanding of federal law[49].

A more substantial constitutional question might arise if the Minnesota legislature, in authorizing actions against the

[49] See n. 44, *supra*.

state under the Minnesota Human Rights Act, had expressly provided that that waiver of sovereign immunity was conditioned on a bar to any tolling of the statute of limitations. But the waiver of the state's immunity contains no such specific limitations. If Minnesota law regarding tolling does not authorize tolling in the circumstances of this case, that would be because of tolling standards that are part of the general law of the state, applicable to private and governmental defendants alike. A state's waiver of its sovereign immunity cannot fairly be said to encompass as a condition of that waiver adherence to the entire corpus of statutory, rule-based and court-made state procedural law. Minnesota procedure differs in countless particulars from federal law; assuredly that does not mean that a state agency, if sued in federal court, could insist that the litigation of any supplemental claim be conducted according to Minnesota procedure[50].

The modest impact of section 1367(d) on a state bears no relationship to the severe invasion of state immunity involved in *Garrett, Kimel and Alden*. Minnesota having ultimately raised its sovereign immunity defense, the action under the Minnesota Human Rights Act will be litigated in Minnesota district court, precisely as provided for in the Act. The standards of liability and scope of remedies will be as specified in the MHRA itself. The University received notice within the time period provided by state law, albeit notice of a proceeding in a court to which the defendant ultimately

[50] Minnesota, for example, permits filing by facsimile transmission. Minn. R. Civ. P. 5.05. The Minnesota federal district courts do not permit this. D.Minn. LR 5.1.

decided to object.[51] Had the University chosen to actively seek dismissal of the supplemental claim at the very outset of the federal proceeding, the matter would have been in the Minnesota district court (assuming that Petitioners chose to refile it there) within a matter of weeks.

If Minnesota state agencies objected invariably and at once to the assertion of supplemental claims, section 1367(d) would have little practical impact; knowledgeable attorneys would not ordinarily bother to include such claims in federal complaints. Section 1367(d) comes into play here precisely because that is not the invariable practice of state defendants. Application of section 1367(d) would affect the outcome of this particular litigation only because it prevents the University from both retaining the option of acquiescing in supplemental jurisdiction and nonetheless objecting that that very option had delayed the date when the state law claim ended up in state court. The state of Minnesota has not determined that preventing at all costs successful actions against state agencies is the only or most important state policy; if it were, the legislature would never have permitted actions against such agencies under the Minnesota Human Rights Act. Rather, the state has concluded that it has an important interest in a determination by the state courts of whether state agencies are in compliance with the MHRA.

[51] American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, Tentative Draft No. 2, p. 114 (1964)("the principal purpose of the statute of limitations, that of giving notice to the opposing party that he must litigate a claim and should therefore preserve all relevant evidence, is served by the filing of a suit even in the wrong court.")

D. Congress May Regulate The Procedures Under Which Constitutional Rights, Including Those of the States, Are Asserted

Sovereign immunity is a defense of constitutional magnitude, but like any other constitutional right it must be asserted and litigated in a manner consistent with the procedural laws and rules applicable in the court in question. *Coleman v. Thompson*, 501 U.S. 722 (1991); *Wainwright v. Sykes*, 433 U.S. 72 (1977). A criminal defendant asserting federal constitutional rights in the Minnesota courts must do so in accordance with state procedure. Minnesota must generally do the same when asserting its own constitutional rights in federal court.[52]

The University does not contend that as a general matter it should have been exempt from federal procedural requirements in asserting its sovereign immunity defense. In the federal proceeding the University filed and served its motion to dismiss in the manner prescribed by the Federal Rules of Civil Procedure and the local rules of the District Court for the District of Minnesota. In this Court the University does not assert any exemption from the requirements of the Supreme Court Rules.

Of course litigants asserting federal constitutional rights cannot be compelled to comply with state procedural rules so onerous that they unreasonably burden the exercise of those rights. *James v. Kentucky*, 466 U.S. 341 (1984). But no such unreasonable burden is present in the instant case. The

[52] In *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974), the Court held that a state could in at least some circumstances raise an Eleventh Amendment defense for the first time on appeal. But this was no more than a court-made exception to a court-made rule; no act of Congress had required Illinois to raise at trial the defense in that case.

University has not, as the court below insisted, been penalized because Petitioners sought to assert their state law claim in federal court. (Pet. App. A11). To the contrary, the University's legal posture is the same as it would have been had it been sued from the outset in state court; the University received notice at the same time, the merits of the litigation will be resolved under the same legal standard, and Petitioners, if successful, will obtain the same remedies. To be sure, the matter reached state court several months later than would have occurred if Petitioners had anticipated the assertion of a sovereign immunity defense, but that was a necessary consequence of affording the defendant the option of staying in federal court, and most of the delay was a result of the nine months that passed between the filing of the original complaint and the University's motion to dismiss the supplemental claims on the basis of sovereign immunity.

The practical and legal problem which gave rise to the federal statute at issue in this case is inherent in the very existence of our federal system. One of the most fundamental decisions made by the framers of the Constitution was to authorize Congress to create a system of lower federal courts. U.S.Const., Art. III sec. 1. Article III envisaged a system of federal courts operating alongside the existing state courts; Congress immediately invoked this power when it adopted the First Judiciary Act creating circuit courts whose jurisdiction was in several respects expressly concurrent with that of the state courts. 1 Stat. 76-79.

The framers understood that the Constitution would lead to a set of parallel judicial systems, and understood that that would inevitably raise practical and legal issues. Much of the discussion at the time concerned a recognition that the two court systems would in some instances have concurrent

jurisdiction, and that there would be some types of claims which might be filed in either federal or state court. The Federalist, No. 82. The framers, of course, could not have foreseen all the issues that would ultimately arise because of the existence of such a dual judicial system. But those who drafted and ratified the Constitution were undoubtedly well familiar with experience in England, the colonies and the states with dual systems of courts of law and courts of equity, and they knew that the interrelationship between those courts had raised a wide range of issues requiring practical solutions.

The existence of the parallel federal and state court systems, like the co-existence of courts of law and equity, necessarily entails interrelationships and differences in practice and procedure which must ultimately be resolved by one sovereign or the other. Either the federal government or the states must have the authority to coordinate relationships between the two court systems.

The federal government has from the outset assumed the responsibility for coordinating the relationship between the federal and state court systems. In doing so, of course, Congress has been properly solicitous of both state law and the state courts. Section 34 of the First Judiciary Act directed federal courts to utilize state law as the rules of decision. *Compare* 1 Stat. 92 *with* 28 U.S.C. § 1652. In 1790 Congress required that federal courts accord full faith and credit to the determinations of state courts. *Compare* 1 Stat. 122 *with* 28 U.S.C. § 1738. In 1793 Congress adopted what has come to be called the anti-injunction act, forbidding the federal courts save in certain narrow circumstances to issue injunctions to stay state court proceedings. *Compare* 1 Stat. 335, ch. 22, § 5 *with* 28 U.S.C. § 2283. The federal habeas corpus statutes, out of respect for the state judicial systems, require both exhaustion

and a degree of deference to state court determinations. 28 U.S.C. §§ 2241-55. But while federal legislation has long reflected solicitude for proceedings in and determinations by state courts, it has never been doubted that the coordination of relations between the federal and state court systems was the responsibility of the national government.

The very existence of supplemental jurisdiction, and the certainty that state claims will at times be dismissed without resolution by the federal courts, require the existence of *some* rule regarding whether such claims can be refiled in state court despite the running of the statute of limitations. This is not an area in which the federal and state courts can simply proceed independently of one another; there has to be a rule regarding tolling, and whatever it is will necessarily affect both court systems. Either the national government or the states must have the authority to adopt the controlling rule governing this issue; there is no third alternative.

The decision of the Minnesota Supreme Court arrogates to that state the supreme authority to control the ground rules governing these interrelated claims and proceedings, and thus to determine how litigants and federal judges must proceed in *federal* court. Minnesota law cuts off a plaintiff's right to refile in state court a dismissed supplemental claim upon the expiration of the applicable state limitation period, regardless of whether a motion to dismiss that claim has even been filed in federal court, regardless of how little time it would leave the federal judge to rule on a motion to dismiss, and regardless of whether it would expire before any federal appeal could be taken. If an appeal regarding a supplemental claim reached this Court on the eve of the expiration of the limitations period, the Minnesota decision would set an absolute deadline

for a decision by this Court, after which a decision declining to exercise federal jurisdiction would be fatal to that state claim.

In the instant case, state law requires the filing of an action under the Minnesota Human Rights Act within 45 days after the issuance of a state right-to-sue letter; even if a plaintiff filed a federal action on the very first day, it would be virtually impossible for a federal judge to hear and resolve in the short period that remained any disputes about supplemental claims. Nothing in this Court's Eleventh Amendment jurisprudence has suggested that either the terms of the Amendment or the principles of federalism accord to the states the right to interfere in this manner with the internal operations of the federal Article III courts.

The interrelationship of Minnesota limitations law and Minnesota claim preclusion principles pose a serious constitutional problem. Claim preclusion requires a plaintiff to attempt to raise state law claims in federal court, and to urge that federal court to exercise jurisdiction over those claims. A federal plaintiff who fails to do so will ordinarily be barred from state court. But, absent section 1367(d), a plaintiff who complies with this state requirement will in turn often be prevented by the state limitations period from refiling in state court if the federal court declines to exercise supplemental jurisdiction. Where that state claim arises under the Minnesota Human Rights Act, with its 45 day limitations period, a plaintiff who attempts without success to include that state claim in his or her complaint will always be unable to refile in state court. The net effect of that legal regime is to deny such a plaintiff any hearing on that state law claim, in violation of the due process guarantee of the Fourteenth Amendment. At the least Minnesota wields a threat of forfeiture of related state claims against any plaintiff who

attempts to litigate his or her federal claims in federal courts, interfering in a constitutionally impermissible manner with access to the federal courts.

CONCLUSION

For the above reasons the decision of the Minnesota Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX A

STATE COURT DECISIONS HOLDING CLAIM PRECLUSION APPLIES TO STATE LAW CLAIMS THAT COULD HAVE BEEN ASSERTED IN FEDERAL ACTION

Alabama

Worthington v. Anderson, 741 So. 2d 437 (Ala. Civ. App. 1999)
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Whalen v. United Air Lines, Inc., 851 P. 2d 251 (Colo. App 1993)
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Franklin v. Gwinnett County Public Schools, 200 Ga. App. 20, 407 S.E. 2d 78 (1991)

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Hall v. State of Hawaii, 7 Haw. App. 274, 756 P. 2d 1048 (Ct.App. 1988)

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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Court File No.:
EM 97-013037

Lance Raygor and James Goodchild

Plaintiffs,

v.
University of Minnesota, a Minnesota State University,

Defendant.

ORDER AND MEMORANDUM

The above-captioned matter came before the Court for a hearing on March 2, 199, on Defendants' Motion to Dismiss. Howard L. Bolter, Esq., appeared on behalf of Plaintiffs. Andrew D. Parker, Esq., appeared on behalf of Defendants.

Based upon all the files, records and proceedings herein and upon the arguments of counsel, **IT IS ORDERED THAT:**

1. Defendants' Motion to Dismiss is **GRANTED**.
2. The accompanying memorandum is incorporated herein by reference

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Dated: 5/28/99

/s/
Cara Lee Neville
Judge of District Court

MEMORANDUM

I. Facts

The facts relevant to this motion are not disputed. Plaintiffs in this age discrimination case are two former employees of the University of Minnesota. Following their alleged unlawful termination, Plaintiffs on August 23, 1995 filed charges of discrimination with the Minnesota Department of Human Rights (MDHR). On July 17, 1996, the MDHR dismissed the charges of both Plaintiffs. Dismissal letters indicated that civil action may be brought in court within 45 days. Plaintiffs evidently received the letters on July 18, 1996. On or about August 30, 1996, Plaintiffs commenced separate actions against Defendants in the United States District Court, alleging violations of the federal Age Discrimination in Employment Act (ADEA) and the Minnesota Human Rights Act (MHRA). The two actions were subsequently consolidated. Thereafter, Defendants moved to dismiss based upon the Eleventh Amendment (sovereign immunity)[1], and on July 11, 1997 the motion was granted. In its order, the federal district court dismissed Plaintiffs' state law claims without prejudice.[2] Within 45 days of dismissal of their federal court action, Plaintiffs commenced the instant action, which contains a single count alleging violations of the MHRA. The instant action has been stayed pending the outcome of the federal court appeal, but the stay has been lifted for the limited purpose of hearing Defendants' present motion to dismiss.

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[1] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[2] Plaintiffs have appealed the decision to the 8th Circuit Court of Appeals. As of the date of this order, the appeal has not been decided.

II. Limitations Periods

This motion to dismiss presents a pure question of law concerning application of statutory and equitable tolling provisions to a statute of limitations. The MHRA requires that a person claiming unlawful employment discrimination first file a complaint with the MDHR as a precondition to suit. There is no dispute as to whether Plaintiffs did so within the required 180 days. The statute contains a second limitations period, allowing a claimant 45 days following receipt of a letter from the MDHR rejecting their claim (commonly known as a "right to sue" letter) in which to commence a civil court action. Failure to do so will render any subsequent suit untimely, resulting in dismissal upon motion by a defendant.

In the instant case, the Plaintiffs timely commenced their claims in federal court under the MHRA, invoking federal supplemental jurisdiction pursuant to 28 U.S.C. § 1367. Their state court claims, however, were filed well outside the 45-day limitations period. The question then is whether the federal court action tolled application of the 45-day limitations period. (The state court action was filed less than 45 days after the federal court action was dismissed). In opposing the instant motion to dismiss, Plaintiffs raise two possible grounds for tolling, statutory and equitable. These will be addressed in turn.

III. Statutory Tolling

Plaintiffs bringing an action in federal district court premised on federal question jurisdiction may now assert connected state court claims under the federal court's supplemental jurisdiction. 28 U.S.C. § 1367(a) (1993). Under that section, supplemental jurisdiction applies "in any civil action of which the [federal] district courts have original jurisdiction". Id. Subsection (d) of the same statute contains

a provision tolling potential state court claims during their pendency in federal court, and for thirty days after their dismissal. 28 U.S.C. § 1367.[3] Defendants in moving to dismiss assert that the tolling provision does not apply, because Plaintiffs' ADEA claim does not qualify as one in which the federal court had "original jurisdiction".

The question presented on this motion appears to be one of first impression, namely whether dismissal of a federal law claim on Eleventh Amendment grounds means that the dismissing court never had "original" jurisdiction under 28 U.S.C. § 1367(a) for purposes of that statute's tolling provision. Plaintiffs in reliance on Franklin v. Zain, 152 F.3d 783 (8th Cir. 1998) assert that because the federal court in this case dismissed Plaintiffs' state law claims without prejudice, the tolling statute must apply. Franklin, however, is clearly distinguishable. Unlike the instant case, the plaintiff in Franklin brought a federal civil rights action and pendant state law claims against both the state and a state employee, the latter in his private as well as official capacity. The court's holding that the statutory tolling provision applied only applied to the non-state defendant. All claims against state defendants had been dismissed on immunity grounds, and were not the subject of this ruling. Moreover, the claim to which tolling applied had been dismissed for failure to state a claim rather than on grounds of immunity, as in the instant case.

Neither side has cited to any relevant legislative history, and no cases have been found on point. In cases involving dismissal of actions against state employees on the basis of qualified immunity, federal courts declining to exercise supplemental jurisdiction over remaining state law claims have commented that such claims are tolled pursuant to 28

[3] Tolling applies if "any claim asserted under subsection (a)" is dismissed. In the instant case, the Federal district court dismissed the pendant state law claims without prejudice.

U.S.C. § 1367(d). See, e.g., Sapp v. Cunningham, 347 F.Supp. 893 (D. Wyo. 1994) (dismissing § 1983 claims on basis of qualified immunity). However, in none of the cases reviewed did the court discuss whether original jurisdiction existed in the first instance.[4]

For the reasons stated more fully below, the Court concludes that the tolling provision does not apply here because the federal district court never had "original jurisdiction" over the controversy. The act of bringing a civil action does not confer jurisdiction. It does not matter that the text of the Eleventh Amendment does not contain the words "jurisdiction" or "original jurisdiction". The primary source of federal jurisdiction is the United States Constitution, and limiting the jurisdictional reach of the federal courts is precisely what the Eleventh Amendment does. Although the federal district court dismissed Plaintiffs' state law claims without prejudice, it dismissed the ADEA claim based upon an absence of subject matter jurisdiction.

A Louisiana court recently addressed this issue for purposes of application of a state tolling statute. In Allo v. Horne, 636 So.2d 1048 (La. App. 1994), plaintiff bus driver brought a federal court action against a school board and various individuals, alleging breach of a various federal civil rights laws and pendant state law claims. The federal district court subsequently dismissed the federal law claims for failure to state a claim. The court then declined to accept jurisdiction over the remaining pendant state law claims, which it dismissed without prejudice for lack of subject matter jurisdiction. In a later-filed, co-extensive state court

[4] The failure of the courts to address this question perhaps owes to fundamental difference between Eleventh Amendment immunity, which applies to states, and qualified immunity, which applies derivatively to private individuals employed by states, acting under the color of state law. In the latter case the court properly exercises original jurisdiction because the individual has been sued qua individual. A second possibility is that the individual defendants simply have never raised this argument before.

action, defendants moved to dismiss based on statute of limitations (known as "prescription" in Louisiana). For purposes of applying the state's tolling law. the issue for determination was whether the federal court was a "court of competent jurisdiction" in the prior action. The defendants argued that tolling did not apply because the state claims, which plaintiff asserted in his state court action, had been dismissed by the federal court for lack of subject matter jurisdiction. The court disagreed, noting that one must look at the entire complaint to determine whether the federal court has jurisdiction in the first instance. United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130 (1966). Central to its ruling that the federal action tolled application of the limitations period, the court observed that the federal claims had been dismissed on the merits rather than for want of subject matter jurisdiction. Accordingly, the federal court was one of competent jurisdiction.[5]

The instant case is distinguishable from Allo because here both the state and federal claims were dismissed for lack of subject matter jurisdiction.[6] Based on the logic of Allo, the complaint to the district court herein was not a civil action of which the court had "original jurisdiction", and the tolling provision of 28 U.S.C. § 1367 does not apply.

[5] Nowhere in the decision did the court discuss the federal tolling statute under consideration in the instant case. The decision also contains no discussion of 11th Amendment immunity, which evidently was not raised as a defense in the federal court action.

[6] The court's opinion reads in full as follows:

> Defendant moves to dismiss, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The Court conducted a telephone conference in this matter on July 10, 1997. Based on the files, records, and proceedings herein, and for the reasons set forth during the conference, IT IS ORDERED that: Defendant's motion is granted. Plaintiffs' claims are dismissed without prejudice.

Although this opinion does not describe the nature of the immunity defense, the basis for dismissal of all claims, federal and state, is Rule 12(b)(1), dismissal for lack of subject matter jurisdiction.

IV. Equitable Tolling

Equity permits a court to relieve a party from the preclusive effect of a statute of limitations in the furtherance of justice. As explained by the court in Bartlett v. Miller and Schroeder Municipals, Inc., 355 N.W.2d 435, 439 (Minn. Ct. App. 1984) (citation omitted), "Tolling principles are a creature of equity and the right to a tolling of the statute of limitations accrues only when the interests of justice require it." Prejudice to defendants is a valid consideration for purposes of this doctrine. Ochs v. Streater, Inc., 568 N.W.2d 858 (Minn. Ct. App. 1997). However, it has been held that equitable tolling is reserved for circumstances that are "truly beyond the control of the plaintiff." Shempert v. Harwick Chemical Corp., 151 F.3d 793, 797 (8th Cir. 1998) (holding that Title VII action not tolled where plaintiff failed to sign and return the Charge to the EEOC before the November 11th expiration of the filing period, despite the fact that she only received it in the mail on November 9th); Ochs, supra (employee was not entitled to equitable tolling of 45-day limitations period in which to bring age discrimination action, where employee offered no evidence that circumstances beyond his control prohibited him from serving complaint within statutory period).

In order for the doctrine to apply, a plaintiff must make a showing of excusable neglect, which may or may not be attributable to defendant. Schlueter v. Anheuser-Busch, Inc., 132 F.3d 455, 458 (8th Cir.1998) (holding that actions taken by EEOC worker excused employee's late filing of Title VII charge). But see Arigo v. U.S., 980 F.2d 1159, 1162 (8th Cir. 1992) (citing Irwin v. Veterans Admin., 498 U.S. 89, ----, 111 S.Ct. 453, 458 (1990)) (equitable tolling does not extend to "garden variety cases involving excusable neglect"). However, "innocent inadvertence" will not toll the statute

of limitations. Jones v. Consolidated Freightways Corp., 364 N.W.2d 426, 429 (Minn. Ct.App. 1985).

Underscoring the narrow focus of this doctrine, equitable tolling will not restore an untimely claim where, through no fault of a party, her attorney miscalculates a statute of limitations. Nolting v. Yellow Freight System, Inc., 799 F.2d 1192, 1200 (8th Cir. 1986). More relevant to the facts at bar, filing in the wrong court will not rescue an untimely-commenced action in the proper court under this doctrine. Lambrecht v. Ford Motor Co., 729 F.2d 1162 (8th Cir. 1984) (concluding under Minnesota law that doctrine of equitable tolling, sought to be invoked on ground of plaintiff's having erroneously originally filed suit in Michigan, would not be applied to permit otherwise untimely diversity action to proceed against automobile manufacturer); Neitz v. Scharf Auto Supply, Inc., 1988 WL 36762 (Minn. Ct.App. 1988) (holding that filing a grievance with the wrong agency – a local rather than state human rights commission – was insufficient grounds for tolling the MHRA).

Here it is not argued that Defendants did or said anything to prevent Plaintiffs from commencing a state district court action within the 45-day limitations period. Rather, Plaintiffs argue that they elected to pursue their MHRA claims in federal court in the good faith belief that the action could be maintained there. Lack of clarity on a question of jurisdiction is sufficient grounds for invoking equitable tolling, particularly where there has been no demonstration of prejudice to the defendant. Capital Tracing, Inc. v. U.S., 63 F.3d 859 (9th Cir. 1995). In this regard, Plaintiffs point out that at the time they commenced their federal court action, four other circuits had barred the exact same immunity defense raised by the Defendants. There was

no binding authority in the Eighth Circuit, which had not yet passed on this question.[7]

The fatal flaw in Plaintiffs' argument is that there was no lack of clarity as to whether they could pursue supplemental state law claims. This is to say that even had the court concluded that it could hear Plaintiffs' federal law (ADEA) claim against Defendants, the court would have had to dismiss their state law (MHRA) claims for lack of jurisdiction, supplemental or otherwise. See Lembach v. State of Indiana, 987 F.Supp. 1095 (N.D. Ind. 1997.) (11th Amendment bars damages claims against state, and court cannot assert supplemental jurisdiction over claims otherwise barred by the 11th Amendment); Doran By and Through Doran v. Condon, 983 F.Supp. 886, 891 (D. Neb. 1997) (dismissing state from suit entirely "[b]ecause Plaintiffs' only claims against the defendant State of Nebraska are state-law tort claims"). Indeed, in none of the seven cases from other circuits cited by Plaintiffs for the proposition that a state defendant may be subject to suit in federal court under ADEA did the plaintiff even assert supplemental or pendant state-law claims against the state defendants. At the time Plaintiffs brought their federal court action, it was (and remains) settled law that the federal courts lacked matter jurisdiction to hear these supplemental claims, irrespective of whether the ADEA action could be maintained. See Pennhurst State School & Hosp. v. Halderman, 104 S.Ct. 900, 907, 465 U.S. 39 (1984) (states are immune from suit in federal court for violations of state law).

Defendants cites Ochs, supra, for the proposition that an attorney's erroneous interpretation of a statute of limitations

[7] Complicating matters is the fact that the court in which the action was brought previously ruled that federal courts do not have jurisdiction over federal discrimination claims asserted against states. Humenansky v. Regents of Univ. of Minnesota, 958 F. Supp. 439 (D. Minn. 1997). However, the 8th Circuit's decision affirming that ruling appears to have been rendered after Plaintiffs commenced their federal court action.

will not warrant equitable tolling. Although Ochs is distinguishable,[8] another case cited by Defendants, Bonhiver v. Graff, 248 N.W.2d 291 (Minn. 1976) is dispositive. In Bonhiver, the Court concluded that "the commencement of an action in a federal district court which lacks jurisdiction does not toll the statute of limitations". The parties in that case arguing for estoppel originally were putative class members in a federal class action suit. Said plaintiffs, however, failed to meet the $10,000 jurisdictional minimum, depriving the federal court of jurisdiction to hear their claims. Accordingly, there could be no tolling of the statute of limitations to allow their intervention in a subsequent state court action, which was filed after the statute of limitations had run on the claims.

Plaintiffs attempt to distinguish Bonhiver, asserting that the federal district court initially had federal question jurisdiction over their ADEA claim and supplemental jurisdiction over their MHRA claim, and that federal jurisdiction was dislodged only after Defendants prevailed on their immunity defense. Plaintiffs in so arguing creates a distinction without a difference. As applied to the facts of this case, sovereign immunity is identical to the absence of subject matter jurisdiction, functionally and as a matter of definition.

That a party might raise sovereign immunity based on the Eleventh Amendment as an "affirmative defense" does not presuppose that the court had jurisdiction over the matter in

[8] The court's rejection of plaintiff's limitations argument in Ochs was not part of its analysis of equitable tolling at all. Rather, the ambiguity argument was part of a question of statutory construction. In that case, counsel attempted to create ambiguity in the law where none existed in order to avoid dismissal based upon the statute of limitations. In the court's word, counsel "contrive[d] a series of arguments to revive his claim." Id. at 859. Specifically, counsel argued that the words "bring an action" must mean something other than "commence an action", because a separate statute calls for the chapter's provisions to be liberally construed. The court disagreed, holding that to "bring" unambiguously meant to "commence".

the first place.[9] Sovereign immunity is an inherent recognition that a court lacks jurisdiction. As noted by the Justice Powell, "A State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued." Pennhurst, 104 S.Ct. at 907. He went on to describe the Eleventh Amendment as an "explicit limitation on federal jurisdiction". Id. at 917. See also Moore v. State of Indiana, 999 F.2d 1125, 1129 (7th Cir.1993) (11th Amendment operates to divest the court of subject matter jurisdiction). The historic basis for this view has been described as follows: "Nothing seems more clear than that this immunity of the King from the jurisdiction of the King's courts was purely personal. How it came to be applied in the United States of America, where the prerogative is unknown, is one of the mysteries of legal evolution." Spanel v. Mounds View School District No. 621, 118 N.W.2d 795, 800, 264 Minn. 279 (1962) (quoting Justice Traynor) (emphasis supplied).

An exception arises in rare cases involving the application of a sovereign immunity defense to a situation involving concurrent jurisdiction, also known as dual sovereignty. In Gavle v. Little Six, Inc., 555 N.W.2d 284 (Minn. 1996), a non-Indian employee of a tribe-owed business brought a civil action in state district court on state law claims arising from her employment. The court explained the immunity issue as follows:

> At the heart of this case is the issue of whether tribal business entities are subject to the application of state civil law in state court. To answer this question, we must analyze two related legal concepts--jurisdiction and sovereign immunity. Though it is sometimes said that state or federal courts are deprived of jurisdiction through the application of tribal sovereign immunity, the concept is more properly thought of as an affirmative defense, to be asserted by a tribe, tribal official or tribal entity as a bar to a particular lawsuit.[10]

Gavle, 555 N.W.2d at 288. In Gavle, the court specifically ruled that it had jurisdiction to hear such claims, even though they arose in part within the jurisdictional boundaries of a sovereign nation. Nonetheless, the court went on to hold that the tribal corporation was entitled to sovereign immunity and, accordingly, dismissal of plaintiff's action. Concurrent jurisdiction in that case was premised on the special constitutional status of Native Americans and other historical considerations, which on the facts of Gavle permitted the state to share in jurisdiction over the case. These factors are absent in the present case, insofar as federal courts lack jurisdiction to hear actions against states altogether. See Pennhurst, 104 S.Ct. at 918 ("[the Eleventh] Amendment thus is a specific constitutional bar against hearing even federal claims that otherwise would be within the jurisdiction of the federal courts"). Without more, lack of prejudice to a defendant is insufficient grounds to invoke equitable tolling. See Baldwin County Welcome Center v. Brown, 466 U.S. 147, 104 S. Ct. 1723, 1726 (1984) (absence of prejudice is "not an independent basis for invoking the doctrine" of equitable tolling). Plaintiffs have not met the requirements for equitable tolling, and therefore, Defendants' motion to dismiss must be granted.

[9] In point of fact, Defendant to the instant case prevailed in the federal district court action on a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.

[10] The Minnesota Supreme Court's classification of immunity as an "affirmative defense" rather than a jurisdictional bar makes sense only in the content of concurrent jurisdiction. See discussion above. In this light, it is significant to note that the Court chose its words carefully, describing tribal sovereign immunity as an affirmative defense.

V. Conclusion

For the reasons set forth in this memorandum, Defendants' Motion to Dismiss is granted. Neither statutory tolling nor equitable tolling applies, and therefore Plaintiffs' suit is untimely.

C.L.N.

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Supreme Court, U.S.
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No. 00-1514

IN THE

Supreme Court of the United States

LANCE RAYGOR and JAMES GOODCHILD,

Petitioners,

v.

REGENTS OF THE UNIVERSITY OF MINNESOTA,

Respondent.

ON WRIT OF CERTIORARI TO THE
MINNESOTA SUPREME COURT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Did the Minnesota Supreme Court correctly hold that 28 U.S.C. § 1367(d) cannot be applied to abrogate the State's statutory limitation of its waiver of sovereign immunity from suit in its own courts?

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13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3567.1 (2d ed. Supp. 2001) 28, 30

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to those cited in Petitioners' brief, Respondent provides the following citations of constitutional provisions and statutes involved in this case:

Constitution of the United States

Article I, section 8, clause 9: "The Congress shall have Power . . . [t]o constitute Tribunals inferior to the supreme Court[.]"

Article I, section 8, clause 18: "The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Article III, section 1: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Amendment X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Supplemental Jurisdiction 28 U.S.C. § 1367

Petitioners only set out a portion of § 1367 in their brief. For convenience, Respondent provides the entire statute in the appendix to this brief.

Minnesota Human Rights Act

Minn. Stat. § 363.14, subd. 2: "Any action brought pursuant to this section shall be filed in the district court of the county wherein the unlawful discriminatory practice is alleged to have been committed . . . ."

STATEMENT OF THE CASE

This case arises from Petitioners' state law claims of employment discrimination asserted against Respondent Regents of the University of Minnesota (University) in state court. In August 1995, Petitioners Raygor and Goodchild filed charges of discrimination with the Minnesota Department of Human Rights (MDHR). (Certiorari Petition Appendix [hereinafter Pet. App.] A43-A45.) Petitioners alleged they were discriminated against on the basis of age in violation of the Minnesota Human Rights Act (MHRA) in connection with changes the University made to their job assignments the previous December. (Pet. App. A45.)

On July 17, 1996, the MDHR sent Petitioners letters notifying them of dismissal of their claims. (Pet. App. A46.) Petitioners received these state dismissal notices on or about July 18, 1996. (Pet. App. A28.) The notice letters advised

each Petitioner that he could bring a civil action against the University "*in state district court within 45 days of receipt of [the] letter*." (Pet. App. A46 (emphasis added).)[1]

Rather than file their state law claims in state court within 45 days as directed by the State, on day 43 of the 45-day limitations period (August 30, 1996) Petitioners each filed a federal court lawsuit against the University alleging violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (ADEA), and appending state law claims. The University timely answered the complaints, asserting its Eleventh Amendment immunity to the federal and state law claims.[2] (Answer ¶ 10, *Goodchild v. Univ. of Minn.*, Case No. 4-96-863 (D. Minn.) [hereinafter *Goodchild* Federal Case]; Answer ¶ 11, *Raygor v. Univ. of Minn.*, Case No. 4-96-862 (D. Minn.) [hereinafter *Raygor* Federal Case].) The University also alleged the statute of limitations as an affirmative defense. (Answer ¶ 16, *Goodchild* Federal Case; Answer ¶ 17, *Raygor* Federal Case.)

1. Under Minnesota law, Petitioners had the option of commencing suit in state district court within one year of the date of the alleged discriminatory actions, or commencing an agency review process, in which case any suit had to have been commenced in state court within 45 days of the receipt of notice of the agency's dismissal of their claims. *See* Minn. Stat. §§ 363.06, subd. 3; 363.14, subd. 1 (2000). Petitioners chose the latter route. While Petitioners reference the notice letters they received from the EEOC at their request (Petitioners' Brief at 3), these letters are irrelevant to Petitioners' state law claims. The EEOC letters did not identify a judicial forum.

2. The United States Court of Appeals for the Eighth Circuit reaffirmed that the University is an arm of the State for Eleventh Amendment purposes in *Treleven v. University of Minnesota*, 73 F.3d 816, 819 (8th Cir. 1996), decided seven months before Petitioners began their federal action.

It immediately was clear that the federal court lacked subject matter jurisdiction over the MHRA claims under *Pennhurst State School Hospital v. Halderman*, 465 U.S. 89, 121 (1984) (*Pennhurst II*). When Petitioners filed their lawsuits, however, it was not yet settled whether federal court jurisdiction existed over their ADEA claims, inasmuch as this Court had not yet decided *Kimel v. Florida Board of Regents*, 528 U.S. 62, 67 (2000) (holding that Congress lacks authority to abrogate the States' Eleventh Amendment immunity on ADEA claims). Accordingly, consistent with the requirements of the original pretrial scheduling orders and the spirit of the Federal Rules of Civil Procedure, the parties began merits discovery. (*See* Pretrial Scheduling Order ¶ 2(a), *Goodchild* Federal Case; Pretrial Schedule ¶ 1, *Raygor* Federal Case.)

After the federal district court decided the question of its subject matter jurisdiction over ADEA claims filed against the University in another case,[3] the parties here stipulated to an amendment to the pretrial scheduling order that specifically provided for the University to submit a dispositive motion. In this stipulation, the parties stated that they "would like to postpone certain fact-gathering and discovery" until after the University's motion to dismiss was resolved. (Stipulation & Order Concerning Scheduling, entered in *Goodchild* Federal Case and *Raygor* Federal Case after consolidation [hereinafter Consolidated Federal Case].) The University submitted its dispositive motion in accordance with the parties' agreement as set forth in the Stipulation and Order.

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3. *Humenansky v. Bd. of Regents of the Univ. of Minn.*, 958 F. Supp. 439, 443 (D. Minn. 1997) (holding that University has Eleventh Amendment immunity from ADEA claims), *aff'd*, 152 F.3d 822 (8th Cir. 1998), *cert. denied*, 528 U.S. 1114 (2000).

The University sought dismissal of all claims, state and federal, in the Consolidated Federal Case on the basis of its Eleventh Amendment immunity.[4] Petitioners did not oppose the motion with respect to the state law claims, stating that they did "not dispute the state's potential Eleventh Amendment immunity from state discrimination claims in Federal Court." (Petitioners' Mem. Opp'n Mot. Dismiss at 9 n.8, Consolidated Federal Case.)

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4. Petitioners' suggestion that the University, through the timing of this dispositive motion, was responsible for their failure to meet the state statute of limitations has no merit. The University raised its Eleventh Amendment defense in its very first pleading. Because Petitioners commenced their federal court lawsuits only *two days* before expiration of the MHRA limitations period, it would not have mattered if the University had moved to dismiss twenty days after being served, or some months later. Practically speaking, the University could have done nothing to "save" Petitioners from their decision to file their state law claims only in federal court with two days remaining. On the other hand, Petitioners easily could have satisfied the limitations deadline merely by filing their state claims in state court, as they were directed to do in the State's notice. (*See* MDHR Notice Letter, Pet. App. A46.) Petitioners' discussion of the paper discovery conducted by the University is also without relevance. First, Petitioners did not raise this argument to the federal court below; they cannot argue it now. (*See* Petitioners' Mem. Opp'n Mot. Dismiss, Consolidated Federal Case.) Second, there is no merit to the notion that the University implicitly waived its Eleventh Amendment immunity by conducting paper discovery. *See Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974) (stating that the Court will consider an Eleventh Amendment defense even if it is not raised until the case is on review before the Supreme Court); *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 467 (1945) (finding that a State defendant did not waive its Eleventh Amendment immunity by defending a case on the merits and not objecting on the basis of the Eleventh Amendment until proceedings in the Supreme Court).

This concession made it unnecessary for the University to make any further argument on the state law claims. On July 11, 1997, the federal court dismissed the entire federal case — both the ADEA and state law claims — based upon the University's Eleventh Amendment immunity. (Pet. App. A50.) Petitioners appealed this decision. (Pet. App. A51.)[5]

On July 31, 1997 — twenty days after the dismissal of their federal case and some 378 days after receipt of their state dismissal notices — Petitioners filed suit on their state law claims in state court against the University. The state trial court initially stayed the action pending resolution of Petitioners' appeal of the dismissal of their federal case, which appeal raised the issue later resolved by this Court in *Kimel*. The state trial court thereafter lifted the stay for the limited purpose of considering, and then granting, the University's dispositive motion on the MHRA claims on the basis of the statute of limitations. (Pet. App. A27; Pet. App. A55.) Petitioners appealed this ruling to the Minnesota Court of Appeals, which reversed, accepting Petitioners' argument that 28 U.S.C. § 1367(d) (1994) tolled the otherwise-expired state statute of limitations. *Raygor v. Univ. of Minn.*, 604 N.W.2d 128, 133, Pet. App. A16, A17 (Minn. Ct. App. 2000), *rev'd*, 620 N.W.2d 680 (Minn. 2001).

The Minnesota Supreme Court granted the University's Petition for Review and, in a unanimous opinion, reversed the intermediate appellate court's decision. Recognizing that "the University's waiver of immunity" was "limited to the parameters set forth by state statute," the State's highest court

5. Petitioners dismissed their appeal after this Court decided *Kimel*. (Notice of Withdrawal of Appeal, *Raygor v. Univ. of Minn.*, File No. 97-3210MNMI (8th Cir. filed Jan. 13, 2000).)

held that "the state's waiver of sovereign immunity for MHRA claims" was limited to "MHRA claims timely filed in state court." "[A]s defined by state law," the supreme court declared, "the University's exposure to MHRA suit in this case existed only for the 45-day period." *Regents of the Univ. of Minn. v. Raygor*, 620 N.W.2d 680, 686, Pet. App. A1, A12 (Minn. 2001). Accordingly, the supreme court held that "section 1367(d) does not apply to toll the statute of limitations" on Petitioners' MHRA claims against the University. *Id.* at 687, Pet. App. A14. This Court granted certiorari on June 4, 2001.

SUMMARY OF ARGUMENT

The issues in this case arise out of an untimely private state court action to enforce state law against a State entity undisputedly cloaked with the State's sovereign immunity. The state statute at issue required suit to be commenced in state court within 45 days of Petitioners' receipt of notice from the State, which Petitioners chose to ignore. The Minnesota Supreme Court concluded unanimously that Minnesota law afforded them no relief from the consequences of their untimely filing. Petitioners now seek to have a federal court — this Court — apply a federal statute, 28 U.S.C. § 1367(d), to force Minnesota to abrogate state statutory limitations applicable to this action, limitations that circumscribe its waiver of sovereign immunity from this suit in its own courts.

The extraordinary federal intrusion requested by Petitioners into private state court litigation against a State sovereign should be rejected for three reasons. First, as the Minnesota Supreme Court held, § 1367(d) cannot constitutionally be applied to abrogate Minnesota's 45-day limit on the waiver of its sovereign immunity from suit in its

own courts. Second, § 1367(d) need not and should not be interpreted as an attempt to require such abrogation. Finally, if the question is reached, § 1367(d) exceeds Congress's lawmaking powers under the U.S. Constitution.

In this case, the Minnesota Supreme Court held as a matter of state law that the University's exposure to suit existed only for the 45-day period provided in the MHRA. Under *Alden v. Maine*, the immunity of the sovereign from suit in its own courts is within "the sole control" of the sovereign itself. 527 U.S. 706, 749 (1999). Congress has no power under Article I to force an unconsenting State to submit to a private suit in its own courts. *Id.* at 754. Under our federalism, the power to decide how far, and on what conditions, to extend the State's consent to be sued rests with the State, not the federal government. Thus, as the Minnesota Supreme Court held, § 1367(d) cannot be applied to abrogate Minnesota's 45-day limit on its waiver of sovereign immunity for MHRA claims.

Application of § 1367(d) in this case cannot be defended as merely an adjunct to the federal court's power to adjudicate the state claims that Petitioners initially filed against the State sovereign in federal court. Under *Pennhurst II*, Petitioners' state claims against the unconsenting sovereign were beyond the Article III jurisdiction of the federal court. The Eleventh Amendment not only required dismissal of Petitioners' state claims against the sovereign, it also precluded federal court jurisdiction from being invoked to resurrect the sovereign's liability on such claims in a subsequent state court proceeding. *Pennhurst II* precludes any application of tolling as an adjunct to a non-existent federal judicial power to adjudicate Petitioners' state claims against the sovereign.

Although § 1367(d) would be unconstitutional under *Alden* and *Pennhurst II* if applied to this case as Petitioners suggest, the statute should not be so interpreted. There is no evidence on the face of the statute (or in the legislative history) that Congress intended to abrogate state sovereign immunity when it enacted § 1367. Section 1367 refers neither to state immunity from suit, nor to the States as defendants at all. Under this Court's "clear statement" rule, the absence of explicit statutory language mandating abrogation of sovereign immunity is dispositive. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000). Most important, employing the "clear statement" principle here avoids "constitutionally doubtful constructions" of § 1367(d). *Jones v. United States*, 529 U.S. 848, 851 (2000).

Apart from the statute's utter silence on the issue of abrogation of state sovereign immunity, it is apparent from the structure of the statute and its legislative history that § 1367(d) applies only to state claims that are within the federal court's jurisdiction, but that are dismissed for discretionary reasons under § 1367(c). Since Petitioners' state claims were not within the federal court's jurisdiction at all, they were not — and could not have been — dismissed for discretionary reasons under § 1367(c), and thus were not subject to tolling under § 1367(d).

Finally, while this case may be resolved based on principles of state sovereign immunity and statutory interpretation, there is a broader, independent constitutional infirmity with § 1367(d): it exceeds the scope of Congress's lawmaking powers. Petitioners seem to suggest that the tolling provision falls within Congress's tribunal power granted in Article I and reflected in

Article III to establish and regulate the federal courts. But Congress's tribunal power does not provide any plenary authority to rewrite state statutes of limitations applicable to a vast, unspecified variety of state law claims filed in the courts of the several States. Rather, the tribunal power authorizes Congress to prescribe procedural rules for use in cases pending in *federal court*. Petitioners cite not a single decision of this Court affirming the use of Congress's tribunal power to displace state substantive law delimiting state claims filed in state courts across the United States. Alternatively, had Congress relied upon its commerce power to enact the tolling provision — and nothing whatever indicates that it did — this Court's recent Commerce Clause decisions confirm that such power would be insufficient. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995).

ARGUMENT

The Petition for a Writ of Certiorari stated that it was of "especial importance" for this Court to resolve the "constitutional question" presented in this case. (Cert. Pet. at 6.) Yet, Petitioners' brief largely fails to analyze the constitutional issues. Instead, their brief attempts to paint a picture of past procedural unfairness and pays tribute to Congress in crafting "a sensible and balanced solution" to this "important problem." (Petitioners' Brief at 13, 24.) As the Minnesota Supreme Court recognized, however, the question whether § 1367(d) applies to state law claims against a State in its own courts only can be answered if the statute is read against the background of the Tenth and Eleventh Amendments, the fundamental principles of federalism these Amendments embody, and the decisions of this Court that interpret them. So viewed, it is plain that § 1367(d) cannot apply

to abrogate the State's statutory limitation of its waiver of sovereign immunity from suit in its own courts.

I. Section 1367(d) Cannot Constitutionally Be Applied to Abrogate Minnesota's 45-Day Limit on the Waiver of Its Sovereign Immunity From Suit in Its Own Courts.

Under Minnesota law, a 45-day limitations period is a condition on the State's waiver of sovereign immunity for MHRA suits in its own courts. *Raygor*, 620 N.W.2d at 686, Pet. App. A12. Congress has no power to alter this limitation and expand the State's waiver of sovereign immunity from suit in its own courts. Petitioners' initial decision to file their claims against Minnesota in a federal forum that had no jurisdiction over those claims does not change this result.

This Court has made clear that Congress cannot instruct a *state* court to entertain a private suit under *federal* law against an unconsenting sovereign. *Alden*, 527 U.S. at 754. Nor may Congress instruct a *federal* court to entertain a private suit under *state* law against an unconsenting sovereign. *See Pennhurst II*, 465 U.S. at 121. These constitutional principles are undisputed, yet Petitioners claim that Congress has — and has exercised — a vastly more intrusive constitutional power to instruct a *state* court to entertain a private suit under *state* law against an unconsenting sovereign. That simply cannot be.

A. Congress Lacks Power Under Article I to Force an Unconsenting State to Submit to a Private Suit in Its Own Courts.

Congress has no power under Article I to force an unconsenting State to submit to private suits for damages, either in federal courts or in its own courts. *See Alden*, 527 U.S. at 754 (holding that "the States retain immunity from private suits in their own courts, an immunity beyond congressional power to abrogate by Article I legislation"); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996) ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").[6] As this Court has observed, "When this Nation was established by the Constitution, each State surrendered only a part of its sovereign power to the national government." *Atlantic Coast Line R.R. Co. v. Bhd. of*

6. The inescapable conclusion from *Alden* and *Seminole Tribe* is even more apparent in light of this Court's decision in *Kimel*. *Kimel* held that Congress lacks the power to abrogate the immunity of an unconsenting State to private age discrimination suits. 528 U.S. at 67. The arguments in favor of the purported congressional abrogation power in *Kimel* were much stronger than they are here, because: (a) the statute at issue purported to authorize suits in federal courts, not to subject States to the indignity of being sued in their own courts at federal command; and (b) Congress had made it unmistakably clear that it perceived a problem of age discrimination justifying invocation of its power under Section 5 of the Fourteenth Amendment to attempt to abrogate state sovereign immunity. Yet this Court held that neither fact sufficed to make the attempted abrogation of state sovereign immunity appropriate. *Id.* at 82-83. If Congress lacks authority to subject a State defendant to a federal age discrimination claim in federal court, *a fortiori* it lacks authority to subject a State defendant to a state age discrimination claim in state court.

Locomotive Eng'rs, 398 U.S. 281, 285 (1970); *see also Printz v. United States*, 521 U.S. 898, 919 (1997); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991); *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). One of the powers reserved to the States was the power to decide whether and for what they could be sued in their own courts. *R.R. Co. v. Tennessee*, 101 U.S. 337, 339 (1879); *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857). Because the decision to waive sovereign immunity is "altogether voluntary" on the part of the State, "it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires." *Beers*, 61 U.S. (20 How.) at 529.

Petitioners suggest that Minnesota did voluntarily waive sovereign immunity by allowing MHRA claims against it in its courts, and that § 1367(d) merely extends this voluntary waiver of immunity in order to achieve laudable policy objectives as determined by Congress. The problem with this approach — in which the State waives sovereign immunity up to a point and then Congress commands the State to extend the waiver further — is that the authority to decide how far and on what conditions to extend a State's consent to be sued rests with the State, not the federal government. This is true virtually by definition: consent to be sued in state court within 45 days of the receipt of a State-issued notice obviously is not consent to be sued more than a year later. *See Alden*, 527 U.S. at 749 ("[T]he immunity of a sovereign in its own courts has always been understood to be within the *sole control* of the sovereign itself." (emphasis added)); *id.* at 758 ("To the extent

Maine has chosen to consent to certain classes of suits while maintaining its immunity from others, it has done no more than exercise a privilege of sovereignty concomitant to its constitutional immunity from suit."); *see also Smith v. Reeves*, 178 U.S. 436, 445 (1900) (recognizing that a State may limit the scope of its waiver to suits in state court). The proposition that the federal government has the authority — for noble or for ignoble ends — to expand a State's limited waiver of sovereign immunity is without precedent in this Court's jurisprudence. It rests on the notion that a statute of limitations is a mere procedural technicality, rather than an integral part of — and limitation upon — the State's consent to be sued.

This Court's cases resoundingly reject this derogation of statutes of limitations. Time and again, this Court has emphasized that statutes of limitations are an integral part of any waiver of sovereign immunity and must be strictly construed for that reason. *See Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983) ("When waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity."); *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979) ("We should also have in mind that the Act waives the immunity of the [sovereign] and that in construing the statute of limitations, which is a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which [the legislature] intended."); *Soriano v. United States*, 352 U.S. 270, 276 (1957) (stating that the legislature "was entitled to assume that the limitation period it prescribed meant just that period and no more. . . . And this Court has long decided that limitations and conditions upon which the Government consents to be sued

must be strictly observed and exceptions thereto are not to be implied").[7]

It is utter fiction to suggest that the Minnesota Legislature actually has given all the consent that is needed, and that the federally mandated extension of the limitations period constitutes something less than the unconsented abrogation of Minnesota's sovereign immunity.[8] The Minnesota Supreme Court held that

7. While the cases cited in the text involve the sovereign immunity of the federal government, not state sovereign immunity, this Court has stated that "we are reluctant to conclude that the States are not entitled to a reciprocal privilege." *Alden*, 527 U.S. at 750.

8. Minnesota law is quite strict in disallowing extension of a statute of limitations outside the period provided for by the Minnesota Legislature. *See Johnson v. Winthrop Labs. Div. of Sterling Drug, Inc.*, 291 Minn. 145, 151, 190 N.W.2d 77, 81 (1971) ("Courts have no power to extend or modify statutory limitations periods."); *Brasie v. Minneapolis Brewing Co.*, 87 Minn. 456, 464, 92 N.W. 340, 343 (1902) (stating that statutes of limitations "fix periods within which controversies and disputes with respect to rights and liabilities must be brought to an end, and beyond which courts will not lend their aid to litigants"). This is especially true in the MHRA area, because Minnesota favors "prompt resolution of discrimination claims" like those in this case. *Vaughn v. Northwest Airlines, Inc.*, 558 N.W.2d 736, 741 (Minn. 1997). Moreover, the fact that Petitioners chose to file their state law claims in a federal forum, and that those claims were dismissed without a ruling on their merits, does not provide a basis to toll the statute of limitations under Minnesota law. *DeMars v. Robinson King Floors, Inc.*, 256 N.W.2d 501, 505 (Minn. 1977) ("[I]f a claim is dismissed without a determination on the merits, the result is the same as if it had never been filed and the statute of limitations had never been tolled."). Under Minnesota law, "the commencement of an action in a Federal district court which lacks jurisdiction does not toll the statute of

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the MHRA 45-day statute of limitations is a condition on the State's waiver of immunity in this case. "[A]s defined by state law, the University's exposure to MHRA suit in this case existed only for the 45-day period following [Petitioners'] notification of dismissal of charges by the Department of Human Rights." *Raygor*, 620 N.W.2d at 686, Pet. App. A12. This construction of state law by the State's highest court is controlling here. *See, e.g., Johnson v. Fankell*, 520 U.S. 911, 916 (1997).

Petitioners also suggest that "[t]he decisions of this Court have only invalidated acts of Congress based on a far more serious interference with state sovereign immunity." (Petitioners' Brief at 37.) But this argument refutes itself. This Court never has suggested that Congress has the power under Article I to "interfere[] with state sovereign immunity" so long as the interference is not "serious." It, rather, has categorically held that Congress may not abrogate state sovereign immunity pursuant to its Article I powers. *See Alden*, 527 U.S. at 754; *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672 (1999); *Seminole Tribe*, 517 U.S. at 72-74. To make an exception for invasions of sovereign immunity that are deemed not to be "serious" under some unspecified standard would make

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limitations." *Bonhiver v. Graff*, 311 Minn. 111, 126, 248 N.W.2d 291, 300 (1976). Minnesota does not have a saving statute that would save Petitioners' MHRA claims. *Id.*, 248 N.W.2d at 300. Minnesota's saving statute is limited to cases where the plaintiff prosecutes a claim to a judgment and that judgment is reversed on appeal for some reason. In that circumstance, the plaintiff has another year to commence a new action. *See* Minn. Stat. § 541.18 (2000); *see also Kulinski v. Medtronic Bio-Medicus, Inc.*, 577 N.W.2d 499, 504 (Minn. 1998).

nonsense of the constitutional principle. As this Court stated in *College Savings*, permitting Congress to abrogate state sovereign immunity under Article I only when certain conditions are satisfied "would of course limit the evil — but it is hard to say that [this kind of] limitation has any more support in text or tradition than, say, limiting abrogation . . . to the last Friday of the month." 527 U.S. at 684.

B. The Eleventh Amendment Precludes Reliance Upon Federal Court Jurisdiction as a Basis to Abrogate a State's Sovereign Immunity.

Petitioners argue that their decision to file state claims against the State in federal court provides an appropriate constitutional foundation for the application of § 1367(d) to those claims. (Petitioners' Brief at 44.) Defending the purported application of § 1367(d) as an adjunct to the federal courts' adjudicatory powers, however, is unsupportable under this Court's established Eleventh Amendment jurisprudence. Under *Pennhurst II*, Petitioners' state law claims against the sovereign were beyond the jurisdiction of the federal court: "[N]either pendent jurisdiction *nor any other basis of jurisdiction* may override the Eleventh Amendment." 465 U.S. at 121 (emphasis added); *see also City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 177-78 n.3 (1997) (Ginsburg, J., dissenting) (observing that supplemental jurisdiction under § 1367 can "embrace the decisions of state . . . agencies, only if the State consents to the district court's jurisdiction"). The Eleventh Amendment not only requires dismissal of state law claims against unconsenting States, it also restrains the use of federal court jurisdiction to expand — or revive entirely, as Petitioners urge — the sovereign's liability to such claims in a subsequent state court proceeding.

When a federal court lacks jurisdiction over a claim, the court may take no further action respecting that claim. "'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). A court dismissing state law claims on Eleventh Amendment grounds cannot order any "independent form of relief" that "would bind State officials in any way." *Green v. Mansour*, 474 U.S. 64, 71 (1985) (disapproving notice relief and declaratory judgment when claims are barred by Eleventh Amendment); *cf. Stevens*, 529 U.S. at 779 (concluding that a court could consider whether a State fell within the statutory definition of "person" before resolving the Eleventh Amendment issue because the statutory question did not "permit the court to pronounce upon any issue, or upon the rights of any person, beyond the issues and persons that would be reached under the Eleventh Amendment inquiry anyway").

What federal courts cannot do directly because of the limited scope of Article III, Congress cannot do indirectly through a jurisdictional statute that effectuates Article III. *See Seminole Tribe*, 517 U.S. at 72-73 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."). The tolling requirement provided in § 1367(d) applies here, if at all, *only* because Petitioners invoked the federal court's Article III jurisdiction. *See* 28 U.S.C. § 1367(d) (tolling

applies only to those state law claims that are "pending" in a federal court). When Congress enacts federal jurisdiction statutes like § 1367, however, it cannot require action that goes beyond the scope of the judicial power established by Article III and delimited by the Eleventh Amendment. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 491 (1983) (noting that congressional legislation may extend to the outer reaches of Article III judicial authority, but it cannot go beyond them). As Petitioners construe § 1367(d), it would violate this principle. Petitioners' construction would allow the jurisdictional statute to surpass the limits of Article III by substantively affecting the State sovereign's rights under state law in a state court proceeding that commenced after a federal court determined that it had no Article III jurisdiction under the Eleventh Amendment. *Pennhurst II* precludes any application of § 1367(d) tolling as an adjunct to a non-existent federal judicial power to adjudicate state claims against the sovereign.

C. Petitioners' Policy Arguments Are Constitutionally Irrelevant and Do Not Require Abrogation of State Sovereign Immunity.

Against these federalism principles enunciated by this Court, Petitioners assert that safeguarding Minnesota's sovereign immunity from suit beyond its 45-day limitations period is inconvenient and undesirable as a matter of policy. As this Court has made clear, however, state sovereign immunity is a foundational element of our Constitution's structure. *See, e.g.*, *Alden*, 527 U.S. at 730 (stating that sovereign immunity from suit without consent "inheres in the system of federalism established by the Constitution"). Petitioners' policy arguments simply cannot displace the constitutional principles that underlie *Alden*.

Even if they were constitutionally relevant — as plainly they are not — Petitioners' policy arguments crumble on close inspection. Petitioners argue that the absence of tolling for Eleventh Amendment-barred claims will result in duplicative lawsuits and inefficiencies because plaintiffs will file their federal claims in federal court and their state claims in state court. This Court in *Pennhurst II* disposed of this type of argument: "[S]uch considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State. That a litigant's choice of forum is reduced 'has long been understood to be a part of the tension inherent in our system of federalism.'" *Pennhurst II*, 465 U.S. at 123 (quoting *Employees of the Dep't of Pub. Health & Welfare of Missouri v. Dep't of Pub. Health & Welfare of Missouri*, 411 U.S. 279, 298 (1973) (Marshall, J., concurring) (citation omitted) (footnote omitted)). Some fifty years earlier in *Missouri v. Fiske*, this Court affirmed that the Eleventh Amendment trumps economy arguments such as those Petitioners offer here, observing that "[c]onsiderations of convenience open no avenue of escape from the [Eleventh Amendment's] restriction." 290 U.S. 18, 25-26 (1933); *see also INS v. Chadha*, 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives — or the hallmarks — of democratic government . . . .").

Petitioners argue that the potential for manipulation by State defendants in waiting to raise their Eleventh Amendment defense justifies the application of § 1367(d) tolling. They suggest that State defendants may sabotage plaintiffs' state law claims by

waiting to raise their Eleventh Amendment defense until after the statute of limitations has expired. This is simply an argument for implied waiver, which is flatly inconsistent with this Court's precedent. *See, e.g.*, *Edelman*, 415 U.S. at 677-78 (permitting State to raise Eleventh Amendment defense on appeal). In any event, the University here immediately raised its Eleventh Amendment immunity defense. To guard against a limitations defense, the obvious solution for plaintiffs is to follow the simple roadmap laid out by this Court in *Pennhurst II*: bring state law claims against a State in the appropriate state forum. After all, it is plaintiffs, not State defendants, who control when and where litigation is commenced and whether a limitations period is satisfied. They do not need § 1367(d) to insure that their state claims will be heard in accordance with state law.

Petitioners attempt to bolster their "unfairness" argument by suggesting that state claim preclusion principles would have prevented them from bringing their state law claims in state court if they had not first filed them in federal court. (*See* Petitioners' Brief at 10, 14-16.) The law, however, is not as Petitioners represent it to be. State courts addressing the issue have held that the claim preclusion doctrine does not prohibit a plaintiff from proceeding in state court where the claims pursued in the state court action are barred from federal court by the Eleventh Amendment. *See, e.g.*, *Burlington N. R.R. v. Bd. of Supervisors of Adair County*, 418 N.W.2d 72, 75 (Iowa 1988); *Waterville Indus., Inc. v. Fin. Auth. of Maine*, 758 A.2d 986, 991 (Me. 2000); *Muza v. Missouri Dep't of Soc. Servs.*, 769 S.W.2d 168, 176 (Mo. Ct. App. 1989); *Johnson v. New York*, 631 N.Y.S.2d 795, 798-99 (N.Y. Ct. Claims 1995); *Medo-Bel Creamery, Inc. v. Oregon*, 673 P.2d 537, 540 (Or. 1983);

Boyne v. Harrison, 647 S.W.2d 82, 86 (Tex. Ct. App. 1983).[9]

Likewise, contrary to Petitioners' suggestion (*see* Petitioners' Brief at 10, 16-17), the Minnesota rule would not preclude state law claims that were outside the jurisdiction of the federal courts. In *Beutz v. A.O. Smith Harvestore Products, Inc.*, the Minnesota Supreme Court made clear that its doctrine of claim preclusion only prevents a second suit based upon claims that were within the scope of the subject matter jurisdiction of the first court. 431 N.W.2d 528, 532 (Minn. 1988). Minnesota's claim preclusion doctrine thus did not require that Petitioners

9. The cases Petitioners cite do not compel a different result. Of all of the cases cited in this section of Petitioners' Brief and in their Appendix A, only four even mention the Eleventh Amendment. In *Hall v. Hawaii*, the plaintiff lost on the merits of his federal discrimination claims in federal court, and the federal court's findings collaterally estopped the plaintiff from arguing in state court that the defendants had discriminated against him. 7 Haw. App. 274, 284, 756 P.2d 1048, 1055 (1988). In *Shumaker v. Iowa Department of Transportation*, the Iowa Supreme Court ruled, as a matter of Iowa law, that the plaintiff could not refile state law claims in state court after voluntarily dismissing them from federal court. 541 N.W.2d 850, 854-55 (Iowa 1995). *Shumaker* is inapposite here, since Petitioners' state law claims were not withdrawn, but were dismissed by the federal court for lack of subject matter jurisdiction. In addition, as the dissent in *Shumaker* notes, the majority simply may have misunderstood the nature of the Eleventh Amendment. *See id.* at 855 (Carter, J., dissenting). The court in *Penn v. Iowa State Board of Regents*, 577 N.W.2d 393 (Iowa 1998), simply followed *Shumaker*. The last of the four cases, *Hayes v. Town of Orleans*, actually undercuts Petitioners' argument, as the court there suggested that claim preclusion would not apply if the Eleventh Amendment had barred the state law claim in federal court. 39 Mass. App. Ct. 682, 684-85, 660 N.E.2d 383, 385-86 (Mass. Ct. App. 1996).

first bring their MHRA claims in federal court. Rather, *Beutz* confirms that the claim preclusion doctrine, as applied in Minnesota, would not have prevented Petitioners from doing what this Court in *Pennhurst II* said they should have done — file their federal claims in federal court and their state claims in state court. Ignoring *Beutz*, Petitioners rely upon decisions from Minnesota's intermediate appellate court and argue that Minnesota law required that they at least attempt to have their MHRA claims heard in federal court. (*See* Petitioners' Brief at 10, 16-17.) None of the Minnesota cases Petitioners cite involved state law claims that fell outside the scope of the federal court's jurisdiction because the claims were barred by the Eleventh Amendment. Accordingly, even if these cases could be viewed as accurately setting forth Minnesota law, they would not apply to Petitioner's MHRA claims.

Of course, even if Minnesota applied its claim preclusion doctrine in the manner that Petitioners suggest — which it does not — the solution would have been for Petitioners to file both their federal and state claims in state court. State courts are as competent as federal courts to resolve discrimination claims. *See Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 826 (1990) ("We have no reason to question the presumption that state courts are just as able as federal courts to adjudicate Title VII claims."); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 275 (1997) ("A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism.").

The reality is that the States are fully capable of addressing the problems Petitioners claim that our dual court system creates. *See, e.g., Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 363 (1988) (White, J., dissenting) (noting that "[i]t seems unnecessary for this Court to protect plaintiffs

whose federal claims prove 'not tenable' from the operation of state statutes of limitations when the States have shown themselves capable of achieving the same result through saving clauses").[10] In the absence of a federal tolling provision, States may resolve the matter in a number of different ways.[11] To the extent the States may perceive there to be a problem involving claims made under their own laws in their own courts, they have ample opportunity—legislatively

10. It is curious that Petitioners rely so heavily on *Carnegie-Mellon*. (*See* Petitioners' Brief at 20-24.) Unlike Petitioners, the plaintiffs in *Carnegie-Mellon* brought state law claims in state court within the state statute of limitations. 484 U.S. at 352. Had Petitioners followed *Carnegie-Mellon* as their guide, their claims might well have been preserved.

11. State legislatures may enact saving statutes to toll state statutes of limitations when a federal court has dismissed a state law claim for lack of subject matter jurisdiction. *See, e.g.*, Conn. Gen. Stat. Ann. § 52-592(d) (West Supp. 2001); 735 Ill. Comp. Stat. Ann. 5/13-217 (West Supp. 2001); Ky. Rev. Stat. Ann. § 413.270 (Michie 1992). State courts also may apply state equitable tolling law to toll limitations periods when pendent claims are dismissed by a federal court and re-filed in state court. *Compare Addison v. California*, 578 P.2d 941, 945 (Cal. 1978) (relying upon the doctrine of equitable tolling to toll a state law pendent claim's statute of limitations), *with Bond v. Serano*, 566 A.2d 47, 47 (D.C. 1989) (refusing to apply the doctrine of equitable tolling to toll a pendent claim's statute of limitations while the federal court exercised jurisdiction over the claim), *and Burr v. Trinity Med. Ctr.*, 492 N.W.2d 904, 906 (N.D. 1992) (same). On the other hand, States may choose not to toll their statutes of limitations for the period of time a supplemental state claim was pending in federal court, as the Minnesota Supreme Court did in this case. State legislatures also may enact saving statutes that do not apply tolling in this situation. *See, e.g.*, Ala. Code § 6-2-38(p) (1993); Cal. Civ. Proc. Code § 355 (West 1982 & Supp. 2001); Minn. Stat. § 541.18.

and judicially — to address it. Leaving resolution of this issue to the several States not only is reasonable, it is the result our constitutional system requires.

II. Section 1367(d) Should Not be Construed to Abrogate Minnesota's 45-day Limit on the Waiver of Its Sovereign Immunity From Suit in Its Own Courts.

Although § 1367(d) would be plainly unconstitutional under *Alden* and *Pennhurst II* if construed to apply to this case, the statute need not, and indeed should not, be so construed. Rather, this Court should adhere to its longstanding "interpretative rule" that avoids "constitutionally doubtful constructions." *Jones*, 529 U.S. at 851. Section 1367 readily lends itself to such a construction, one that avoids imputing congressional intent to abrogate state sovereign immunity in the absence of unmistakably clear statutory language.

A. Congress Has Not Made Its Intent to Abrogate State Sovereign Immunity Unmistakably Clear in the Language of the Statute.

"'[I]f Congress intends to alter the usual constitutional balance between States and the Federal Government,'" this Court requires that Congress "'make its intention to do so *unmistakably clear* in the language of the statute.'" *Stevens*, 529 U.S. at 787 (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (emphasis added)). There is not a shred of evidence, let alone the requisite "unmistakably clear" statutory language, that Congress intended to abrogate state sovereign immunity in any part of § 1367, a statute of broad and general applicability. Section

1367(d) does not even refer to the States' immunity from suit in their own courts. The absence of explicit statutory language supporting abrogation is dispositive.[12] This Court therefore should construe § 1367(d) not to toll the statute of limitations for private state claims originally filed in federal court against a State sovereign. *See id.* at 787 (construing a federal statute as not applicable in private actions against State defendants, both to honor the rule that Congress must speak with unmistakable clarity when it intends to alter the federal-state balance, and to avoid the Eleventh Amendment question); *id.* at 788-89 (Ginsburg, J., concurring) (resting vote on "the clear statement rule applied to private suits against a State"); *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989); *see also Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (construing a federal statute narrowly to avoid an interpretation that would "alter[] the federal-state framework by permitting federal encroachment upon a traditional state

12. Likewise, there is no mention of abrogation in the legislative history. *See* H.R. Rep. No. 101-734, 1, 27-30 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6873-76. In fact, Congress rejected a proposal by Professor Arthur D. Wolf, who was contributing to Congress's work on supplemental jurisdiction, that § 1367 specifically provide for supplemental jurisdiction over state law claims against the State. *See Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing on H.R. 5381 and H.R. 3898 Before the Subcomm. on Courts, Intellectual Prop., & the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong. 686-700 (1990) (Letter Proposal to Codify Supplemental Jurisdiction from Arthur D. Wolf, Prof. of Law, to Rep. Robert W. Kastenmeier, Chairman, Subcomm. on Courts, Intellectual Prop., & the Admin. of Justice (June 8, 1990)). That proposal was intended to overrule *Pennhurst II* by abrogating the States' Eleventh Amendment immunity. *Id.* at 699. Congress chose not to adopt this proposal.

power"); *Jones*, 529 U.S. at 858 (construing a federal statute narrowly to avoid the constitutional issues of federalism).

Not only is there no language in § 1367(d) that "unmistakably" indicates Congress's intention to apply tolling against unconsenting States, but the language that does appear confirms Congress's intention not to apply tolling to such claims. Tolling applies only to claims that fall within the supplemental jurisdiction of the federal court as defined in § 1367(a), and that subsection makes clear that only those state law claims that are properly considered part of a "case or controversy under Article III of the United States Constitution" are within supplemental jurisdiction. Under *Pennhurst II*, however, state law claims against unconsenting States do not fall within federal court jurisdiction "under Article III of the United States Constitution," as required by subsection (a). *See Pennhurst II*, 465 U.S. at 98 (emphasizing that "'the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given'" (quoting *Ex parte New York*, 256 U.S. 490, 497 (1921)) (emphasis omitted)).

Congress legislates against the backdrop of this Court's decisions. *See United States v. Wells*, 519 U.S. 482, 495 (1997) ("[W]e presume that Congress expects its statutes to be read in conformity with this Court's precedents . . . ."). Accordingly, this Court may presume Congress knew of *Pennhurst II* and its effect when it enacted § 1367, and would have expected the statute to be interpreted consistently with *Pennhurst II*, such that the tolling provision of subsection (d) would not apply to state law claims falling outside of the supplemental jurisdiction defined in subsection (a).

B. Properly Construed, Section 1367(d) Applies Only to Claims Dismissed Under Section 1367(c).

Not only is § 1367(d) tolling limited to claims that fall within the Article III jurisdiction of the federal court, but, as a leading commentator suggests, "the tolling provision of (d) should be read as coming into play only if the court exercises its discretion, under § 1367(c), to dismiss a supplemental claim of which it has jurisdiction under subsection (a)." 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3567.1 n.51 (2d ed. Supp. 2001).

Section 1367(c) codifies four circumstances, previously outlined in *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), in which a federal court may decline to exercise its jurisdiction over a supplemental state law claim.[13] In these instances, the supplemental claim, which the court otherwise would have been "empowered" to hear, may be dismissed. *See* H.R. Rep. 101-734, at 29, *reprinted in* 1990 U.S.C.C.A.N. at 6875. The statutory scheme thus grants supplemental jurisdiction in subsection (a), provides discretionary reasons for declining such jurisdiction in subsection (c), and finally provides for tolling in subsection (d), suggesting that the tolling authorized by the statute is tied to both the availability of supplemental jurisdiction and the discretionary decision not to exercise it.

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13. Section 1367(c) permits a district court to dismiss supplemental claims when "the claim raises a novel or complex issue of State law;" the state law claim "substantially predominates" over the original jurisdiction claim; the original jurisdiction claim has been dismissed; or there are other "exceptional circumstances" for declining jurisdiction.

This reading is confirmed by the legislative history.[14] The House Report on the Judicial Improvements Act of 1990 addressed the tolling provision of subsection (d) in a short paragraph:

> Subsection 114(d) provides a period of tolling of statutes of limitations for any supplemental claim that is dismissed *under this section* and for any other claims in the same action voluntarily dismissed at the same time or after the supplemental claim is dismissed. The purpose is to prevent the loss of claims to statutes of limitations where state law might fail to toll the running of the period of limitations while a supplemental claim was pending in federal court. It also eliminates a possible disincentive from such a gap in tolling when a plaintiff might wish to seek voluntary dismissal of other claims in order to pursue an entire matter in state court when a federal court dismisses a supplemental claim.

H.R. Rep. No. 101-734, at 30, *reprinted in* 1990 U.S.C.C.A.N at 6876 (emphasis added). The only provision in § 1367 for dismissal of supplemental claims "under this section" (*i.e.*, § 114 of the bill, later codified at 28 U.S.C. § 1367) is found in subsection (c), by which the federal courts are given authority to "decline" jurisdiction over certain claims that properly are within the scope of supplemental jurisdiction. By contrast, if the federal court dismisses a

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14. While the language of a statute generally will control if it is unambiguous, this Court may look to legislative history to confirm that its interpretation of a statute is not "at odds with the intentions of the drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

proffered supplemental claim for some reason other than those listed in subsection (c), the tolling provision is inapplicable. *See* 13B Wright, § 3567.1 n.51 ("If something is found not to be a supplemental claim, it will be dismissed under Rule 12(b)(1) and it would not be 'dismissed under this section,'" and the tolling provision would not apply. (citation omitted)).[15]

Consistent with this understanding, the tolling provision does not apply to Petitioners' claims because they were not dismissed for one of the reasons listed in subsection (c). Rather, the federal court dismissed Petitioners' state claims under Federal Rule of Civil Procedure 12 because it did not have jurisdiction over them. (*See* Federal District Court Order, Pet. App. A50 (noting that the University's Motion to Dismiss was brought under Rule 12(b)(1)).)[16]

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15. *See* John Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. Davis L. Rev. 855, 945 (1998) ("A close reading of the legislative history conclusively supports" the view Congress intended the tolling provision to apply only to those claims "'[properly] asserted under subsection (a)' that the district court dismissed not for lack of supplemental jurisdiction, but rather because the district court elected not to exercise supplemental jurisdiction for one of the discretionary reasons permitted by subsection (c).").

16. The University pressed the statutory interpretation arguments made here to the courts below. (*See* University's Brief in Minnesota Supreme Court at 11 (arguing that the clear statement rule was not met); University's Brief in Opposition at 3, 8 n.6 (reflecting University's argument to the trial court that statutory tolling is inapplicable when a state law claim is dismissed because the federal court lacked "original jurisdiction" over the action as required by § 1367(a)).) Of course, even if the statutory interpretation grounds had not been argued by the University below, a "respondent may defend the judgment on a ground not previously raised." *United States v. Estate of Romani*, 523 U.S. 517, 526 n.11 (1998).

III. Even Apart from Issues of State Sovereign Immunity and Related Principles of Statutory Construction, Section 1367(d) Exceeds the Scope of Congress's Lawmaking Powers.

While the principles of state sovereign immunity and statutory interpretation discussed above are sufficient to resolve this case against a sovereign defendant, there is a broader, independent constitutional infirmity with § 1367: it exceeds Congress's lawmaking powers. Petitioners devote little attention in their brief to the source of Congress's power to enact § 1367(d), but they seem to suggest that the tolling provision falls within the scope of Congress's tribunal power to establish and regulate the federal courts under Article I, § 8, cl. 9 and Article III, § 1 of the Constitution. (*See* Petitioners' Brief at 41-45.)[17] Neither Congress's tribunal power nor any other Article I power authorizes Congress to enact a sweeping expansion of state statutes of limitations applicable to an unlimited and unspecified variety of state law claims adjudicated in state courts.

Since the Founding Convention, it has been understood that the legislative power of Congress is limited, extending only to those enumerated subjects expressly set forth in the Constitution. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("'The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.'" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803))); *see* U.S. Const. amend X. In particular,

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17. *See also* Cert. Pet. at 10 (citing *Estate of Fennell v. Stephenson*, 137 N.C. App. 430, 528 S.E.2d 911 (N.C. Ct. App. 2000), *rev. granted*, 352 N.C. 588, 545 S.E.2d 224 (2000); *Blinn v. Florida Dep't of Transp.*, 781 So. 2d 1103 (Fla. Dist. Ct. App. 2000)).

> neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law.

Hanna v. Plumer, 380 U.S. 460, 471-72 (1965).

Congress's tribunal power does not provide plenary authority to rewrite state statutes of limitations applicable to an indeterminate number and variety of state law claims filed in state courts. Rather, the tribunal power granted in Article I and reflected in Article III authorizes Congress to prescribe procedural rules for use in cases pending *in federal court*. *Id.* at 472; *see also Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988) ("[28 U.S.C. §] 1404(a) is doubtless capable of classification as a procedural rule . . . ."); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988) (finding that "a statute mandating when an appeal may be taken from one federal court to another" falls within Congress's tribunal power). The tribunal power cannot be used to support § 1367(d), however, because it is not a procedural rule for the federal courts at all. It is a substantive, outcome-affecting rule for state claims in state court litigation following the conclusion of a federal court proceeding, as illustrated in this case.

Under Minnesota law, the purpose and effect of the statutory 45-day limitations period goes beyond simply providing timely notice to a defendant, as Petitioners contend. (Petitioners' Brief at 39-40.) When the Minnesota Legislature creates a statutory right of action like the MHRA, and "also fixes the time within which the right may be enforced, the time so fixed becomes a

limitation or condition upon the right, and will control, no matter in what forum the action is brought." *Negaubauer v. Great N. Ry. Co.*, 92 Minn. 184, 185, 99 N.W. 620, 621 (1904); *see also In re Daniel's Estate*, 208 Minn. 420, 430, 294 N.W. 465, 470 (1940). This Court repeatedly has recognized that substantive state law defining state claims must be respected. Over 50 years ago, this Court held that "Congress has no power to declare substantive rules of common law applicable in a State." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Moreover, this Court also has declared many times that state statutes of limitations govern state law claims even when those claims are pending in federal court. For example, in *Guaranty Trust Co. v. York*, this Court ruled that the federal court must follow the state statute of limitations because the right at issue was "derived not from the United States but from one of the States." 326 U.S. 99, 108-09 (1945); *see also Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980) (following a state rule that was an "integral part of the several policies served by the statute of limitations"); *Ragan v. Merchs. Transfer & Warehouse Co.*, 337 U.S. 530, 533-34 (1949) ("We cannot give [the claim] longer life in the federal court than it would have had in the state court without adding something to the cause of action. We may not do that consistently with *Erie* . . . .").

Congress's tribunal power never has been used to support the kind of displacement of state substantive law governing state claims in state court that § 1367(d) effectuates. Indeed, Petitioners cite no decision of this Court affirming such sweeping congressional authority.[18] There is no such authority

18. Petitioners argue that Congress has the authority to alter the substance of state law claims under an asserted power to (Cont'd)

because, as this Court has noted, when Congress purports to dictate to state courts the law governing adjudication of state claims, Congress must utilize a power other than its tribunal powers. *See Southland Corp. v. Keating*, 465 U.S. 1, 14 (1984) (observing that "Congress would need to call on the Commerce Clause if it intended the [Federal Arbitration] Act to apply in state courts"); *see also id.* at 28 (O'Connor, J., dissenting) ("[A] power derived from Congress's Art. III control over federal court jurisdiction would not by any flight of fancy permit Congress to control proceedings in state courts."). In *Southland*, this Court held that since the Federal Arbitration Act, 9 U.S.C. § 2, was validly enacted pursuant to the Commerce Clause, it controlled in state court proceedings even though it conflicted with state law. *See* 465 U.S. at 11 ("The Federal Arbitration Act rests on the authority of Congress to enact substantive rules under the Commerce Clause."); *see also id.* at 12-13 ("'The purpose of this bill is to make valid and enforcible [sic] agreements for arbitration contained *in contracts involving interstate commerce* . . . .'" (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924) (alterations in original))).

In stark contrast to the Federal Arbitration Act, there is nothing whatever in the legislative history of § 1367(d) to suggest that Congress even considered exercising its commerce powers

(Cont'd)

"coordinat[e] the relationship between the federal and state court systems." (Petitioners' Brief at 43.) Precedent from this Court confirms that any such "coordination" authority cannot be used in this manner. *See Erie R.R.*, 304 U.S. at 79 ("'Supervision over either the legislative or judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States.'" (quoting *Baltimore & Ohio R.R. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting))).

to enlarge state statutes of limitations over a potentially dizzying variety of state law claims heard in state courts. *See* H.R. Rep. No. 101-734, at 27-30, *reprinted in* 1990 U.S.C.C.A.N. at 6873-76. Petitioners do not contend that Congress did so when it enacted § 1367(d).[19] Moreover, had Congress relied upon its commerce powers to enact the tolling provision, this Court's recent Commerce Clause decisions confirm that such power would be insufficient.

In *United States v. Lopez*, this Court noted that "the scope of the interstate commerce power 'must be considered in the light of our dual system of government.'" 514 U.S. at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). Congress's commerce power "'may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a

19. Petitioners do note that Congress has exercised its Article I powers to toll statutes of limitations in other contexts. (*See* Petitioners' Brief at 26 n.36, 28.) But these examples — insofar as they are relevant at all to the issue here — only show that Congress's power to amend state laws applicable to state claims heard in state courts must be found in a constitutional provision other than its tribunal powers. For example, Congress clearly has authority under its Article I war powers to suspend statutes of limitations during times of armed conflict, or to benefit those who are in military service. *See, e.g., Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 507 (1870) (holding that a federal law suspending the running of statutes of limitations during the Civil War was constitutional under Congress's war powers). Congress invoked its commerce powers to enact Y2K legislation. *See* 15 U.S.C. § 6601(b) (Supp. 1999). These statutes confirm that when Congress preempts state law, it must do so through use of a power separate from its tribunal power.

completely centralized government.'" *Id.* (quoting *Jones & Laughlin*, 301 U.S. at 37). In *Lopez*, federal legislation establishing gun-free zones around schools was invalidated because the Court declined to "pile inference upon inference" in order to find some effect on interstate commerce. *Id.* at 567; *see also Morrison*, 529 U.S. at 608 (explaining the limits on Congress's commerce powers).

The same piling-on of speculative inferences would be required to sustain § 1367(d) under the Commerce Clause. As with the statute invalidated in *Lopez*, § 1367(d) certainly is not

> a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can [it] be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if [the statute] is to be sustained, it must be . . . a regulation of an activity that substantially affects interstate commerce.

514 U.S. at 559. But § 1367(d) is a federal court jurisdiction statute that, like the statute invalidated in *Lopez*, by its terms has nothing to do with "commerce" or any particular forms of commercial activity. *See id.* at 561. Similarly, § 1367(d) contains no jurisdictional element that would ensure, through case-by-case inquiry, that the activity "in question affects interstate commerce." *Id.* Nor are there any legislative findings regarding the effect, if any, of § 1367(d) upon interstate commerce. *See id.* at 562 (stating that the Court will consider legislative findings "regarding effect on interstate commerce"). In sum, "[a]bsent a stronger connection or identification with

commercial concerns that are central to the Commerce Clause," § 1367(d) "contradicts the federal balance the Framers designed and that this Court is obliged to enforce." *Id.* at 583 (Kennedy, J., concurring). *Compare Morrison*, 529 U.S. at 613 (noting that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature"), *with Reno v. Condon*, 528 U.S. 141, 148 (2000) ("Because drivers' information is, in this context, an article of commerce, its sale or release into the interstate stream of business is sufficient to support congressional regulation."). In light of this analysis, § 1367(d) simply cannot be justified either under the tribunal power or under the Commerce Clause.[20]

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20. It is no answer to the lack of enumerated power under Article I for Petitioners simply to rely on the Supremacy Clause. U.S. Const. art. VI. The Supremacy Clause does not authorize otherwise unconstitutional legislation. Rather, it elevates to the "Law of the Land" only those laws that are within Congress's authority to enact. *See Alden*, 527 U.S. at 731 ("Appeal to the Supremacy Clause alone merely raises the question whether a law is a valid exercise of the national power."). In like fashion, the Necessary and Proper Clause is not an independent source of congressional authority. The Necessary and Proper Clause authorizes Congress to pass those laws that are "necessary and proper for carrying into Execution the *foregoing Powers*." U.S. Const. art. I, § 8, cl. 18 (emphasis added). Because none of the "foregoing powers" in Article I authorizes Congress to modify generally state statutes of limitations for state claims brought in state court, there can be no resort to the Necessary and Proper Clause to support enactment of § 1367(d). *See Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960) (noting that Necessary and Proper Clause "is not itself a grant of power").

CONCLUSION

The judgment of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX — RELEVANT STATUTE

Supplemental Jurisdiction — 28 U.S.C. § 1367

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if —

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

No. 00-1514

In the Supreme Court of the United States

LANCE RAYGOR AND JAMES GOODCHILD, PETITIONERS

v.

REGENTS OF THE UNIVERSITY OF MINNESOTA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Minnesota Supreme Court held that 28 U.S.C. 1367(d), the tolling provision of the supplemental jurisdiction statute, is unconstitutional as applied to claims against a nonconsenting state defendant. The United States addresses the antecedent question of whether Section 1367(d) may fairly be construed to avoid that constitutional question.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Minnesota Supreme Court (Pet. App. A1-A15) is reported at 620 N.W.2d 680. The opinion of the Minnesota Court of Appeals (Pet. App. A16-A26) is reported at 604 N.W.2d 128. The opinion of the Hennepin County District Court (Pet. Br. App. B1-B13) is unreported.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on January 4, 2001. The petition for a writ of certiorari was filed on March 30, 2001, and was granted on June 4, 2001. The jurisdiction of this Court rests on 28 U.S.C. 1257(a). On October 9, 2001, the Court

granted the motion of the United States to intervene in the case pursuant to 28 U.S.C. 2403.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution is reproduced in the appendix to the brief. App., *infra*, 1a. Section 1367 of Title 28 is also reproduced in full in the appendix to the brief. App., *infra*, 1a-2a.

STATEMENT

1. The supplemental jurisdiction statute, 28 U.S.C. 1367, authorizes federal district courts to exercise jurisdiction over pendent state-law claims—*i.e.*, claims that would not, standing alone, come within a district court's original jurisdiction, but that "are so related to" claims within the court's original jurisdiction "that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. 1367(a). The statute generally tolls the limitations period for such claims while they are pending in federal court and for 30 days after they are dismissed. See 28 U.S.C. 1367(d). This case concerns the application of the statute—and, specifically, its tolling provision—to state-law claims against a nonconsenting state defendant.

Congress enacted the supplemental jurisdiction statute as part of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, to codify the common-law doctrines of pendent and ancillary jurisdiction. See H.R. Rep. No. 734 (House Report), 101st Cong., 2d Sess. 27-29 (1990); *City of Chicago* v. *International Coll. of Surgeons*, 522 U.S. 156, 165 (1997). In *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 (1966), the Court had held that district courts, when

adjudicating federal-law claims within their subject-matter jurisdiction under 28 U.S.C. 1331, also may adjudicate state-law claims over which they would not otherwise have jurisdiction, if the federal-law and state-law claims "derive from a common nucleus of operative fact" and thus comprise "but one constitutional 'case'" under Article III. 383 U.S. at 725.

In a series of decisions after *Gibbs*, the Court identified various limits on a district court's ability to adjudicate claims that, although not independently within its subject-matter jurisdiction, are related to claims within its jurisdiction. See, *e.g.*, *Aldinger* v. *Howard*, 427 U.S. 1 (1976); *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365 (1978). In *Finley* v. *United States*, 490 U.S. 545 (1989), the Court held that a district court could not, in the absence of congressional authorization, exercise jurisdiction over pendent parties, *i.e.*, parties that are not the subject of any claim independently within the district court's jurisdiction.

Against that backdrop, the Federal Courts Study Committee recommended that "Congress expressly authorize federal courts to hear any claim arising out of the same 'transaction or occurrence' as a claim within federal jurisdiction, including claims, within federal question jurisdiction, that require the joinder of additional parties." *Report of the Federal Courts Study Committee* 47 (Apr. 2, 1990). See also *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary* (*House Hearing*), 101st Cong., 2d Sess. 155-56 (1990) (statement of Judge Deanell R. Tacha, Chairman, Judicial Conference Committee On The Judicial Branch, expressing support for supplemental jurisdiction legisla-

tion); *id.* at 686 (letter from Professor Arthur D. Wolf noting academic support for such legislation). Congress responded by enacting 28 U.S.C. 1367, which generally codified the doctrine of pendent jurisdiction that was recognized in *Gibbs* and provided the congressional authorization that the Court found lacking in *Finley* by expressly permitting pendent party jurisdiction. See Arthur D. Wolf, *Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal*, 14 W. New Eng. L. Rev. 1 (1992).

Section 1367 states, in relevant part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> * * * * *
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
>
> (1) the claim raises a novel or complex issue of State law.
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.
>
> (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.
>
> * * * * *

28 U.S.C. 1367.

2. In August 1995, petitioners filed charges with the Equal Employment Opportunity Commission (EEOC), alleging that the University of Minnesota discriminated against them in employment on the basis of age. The EEOC, pursuant to a work-sharing agreement, cross-filed the charges with the Minnesota Department of Human Rights (MDHR). Pet. Br. 3; Pet. App. A2-A3.

On June 6, 1996, the EEOC dismissed the charges and advised petitioners by letter that they had 90 days within which to file an action under the federal Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* On July 17, 1996, the MDHR likewise dismissed the charges and advised petitioners by letter that they had 45 days within which to file an action in state court under the Minnesota Human Rights Act (MHRA), Minn. Stat. ch. 363 (1991). Pet. Br. 3; Pet. App. A3.

Forty-four days later, on August 30, 1996, petitioners filed suit in federal district court, alleging violations of both the ADEA and the MHRA by the Regents of the University of Minnesota. Pet. Br. 4; Pet. 3-4. The Regents moved to dismiss both the federal-law and state-law claims on Eleventh Amendment grounds. Pet. Br. 4-5; Pet. App. A18.

On July 11, 1997, the district court granted the motion to dismiss. Pet. Br. 6; Pet. App. A3, A50. Petitioners appealed the dismissal of their ADEA claims to the Eighth Circuit. The appeal was stayed pending the disposition by the Eighth Circuit, and subsequently this Court, of other cases concerning the validity of Congress's abrogation of the States' Eleventh Amendment immunity from private suits under the ADEA. Pet. Br. 6; Pet. App. A3. Petitioners dismissed their appeal after this Court held, in *Kimel* v. *Florida Board of Regents*, 528 U.S. 62 (2000), that the ADEA does not validly abrogate the States' Eleventh Amendment immunity. Pet. Br. 6-7; Pet. App. A3.

3. a. On July 31, 1997, while the appeal of the dismisal of their ADEA claims was pending in the Eighth Circuit, petitioners filed this action in state court, alleging age discrimination by the Regents in violation of the MHRA. Pet. Br. 7; Pet. App. A3. The action was stayed until December 1998. Pet. Br. 7-8. The state trial court then lifted the stay to permit the Regents to move to dismiss the action on statute of limitations grounds. *Id.* at 8.

On March 28, 1999, the state trial court granted the motion. The court accepted the Regents' argument that petitioners' MHRA claims were untimely because they were not filed within 45 days after petitioners received notice that the MDHR had dismissed their charges. Pet. App. A28-A32. The court held that 28

U.S.C. 1367(d) did not apply to toll the statute of limitations on the MHRA claims, because the federal district court never had "original jurisdiction" over petitioners' ADEA claims within the meaning of 28 U.S.C. 1367(a). The court noted that the ADEA claims had been dismissed based on the Eleventh Amendment, which the court understood to "limit[] the jurisdictional reach of the federal courts." Pet. App. A29-A32.

The state trial court further concluded that equitable tolling was not appropriate as a matter of state law. The court reasoned that, wholly apart from the impact of the Eleventh Amendment on petitioners' ADEA claims, petitioners should have known from this Court's decision in *Pennhurst State School and Hospital* v. *Halderman*, 465 U.S. 89 (1984), that the Eleventh Amenment barred the federal courts from adjudicating their state-law claims against a state entity. Pet. App. A33-A37.

b. The Minnesota Court of Appeals reversed, holding that 28 U.S.C. 1367(d) tolled the statute of limitations for petitioners' MHRA claims while those claims were pending in federal court. Pet. App. A19-A24. In so holding, the court rejected the Regents' argument that Section 1367(d) applies only to pendent state-law claims that are dismissed under Section 1367(c) in an exercise of the district court's discretion, and does not apply to claims subject to mandatory dismissal under the Eleventh Amendment. *Id.* at A22-A23. In the alternative, the court of appeals ruled that the statute of limitations on petitioners' MHRA claims was equitably tolled while they were pending in federal court. *Id.* at A24-A25.

c. The Minnesota Supreme Court reversed. Pet. App. A2-A15. The court concluded that the application of 28 U.S.C. 1367(d) to toll the statute of limitations on

petitioners' MHRA claims against the Regents "is an unconstitutional infringement on state sovereign immunity in violation of the Eleventh Amendment." Pet. App. A2. The court, citing *Alden* v. *Maine*, 527 U.S. 706 (1999), reasoned that Congress has no power to expand the terms of a State's waiver of its immunity from suit in its own courts. Pet. App. A10-A14. The court assumed, without addressing the matter, that Section 1367(d) applies to toll the statute of limitations on all pendent state-law claims, regardless of the identity of the defendant or the ground on which the claim was dismissed. The court also reversed the appellate court's equitable tolling ruling. *Id.* at A14-A15.

SUMMARY OF ARGUMENT

The tolling provision of the supplemental jurisdiction statute, 28 U.S.C. 1367(d), is properly construed to avoid the constitutional question presented in this case —*viz.*, whether Congress may, consistent with the Eleventh Amendment and the doctrine of sovereign immunity, toll the statute of limitations for state-law claims asserted in state court against a nonconsenting state defendant. Interpreting Section 1367(d) to extend the statute of limitations for a state-law claim against a nonconsenting state defendant raises significant constitutional questions. When faced with two possible constructions of an Act of Congress, one of which presents serious constitutional questions and one of which avoids them, this Court adopts the latter construction so long as it is not "plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Two such saving constructions are available here.

I. The supplemental jurisdiction statute, and Section 1367(d) in particular, should be understood as not applying to state-law claims asserted against a nonconsenting state defendant. There is no indication that Congress intended the supplemental jurisdiction statute to abrogate the States' immunity from suit in federal court on state-law claims. Congress enacted the statute against the backdrop of this Court's decision in *Pennhurst State School and Hospital* v. *Halderman* (*Pennhurst II*), 465 U.S. 89 (1984), which held that the Eleventh Amendment bars the adjudication of such claims in federal court. Congress did not expressly attempt to reach state-law claims against nonconsenting States, even though it was aware that, in order to abrogate the States' sovereign immunity, it must make its intent "unmistakably clear in the language of the statute." *Dellmuth* v. *Muth*, 491 U.S. 223, 228 (1989).

There is no more reason to conclude that Congress intended to alter the States' immunity from suit under their own laws in their own courts. Any effort to modify the terms of a State's waiver of sovereign immunity in its own courts would be extraordinary and would raise serious constitutional concerns. The text of Section 1367(d) does not make any specific reference to claims against nonconsenting state defendants. Nor does the legislative record evince any intent by any member of Congress to apply the tolling rule to such claims. In light of Congress's silence, there is no reason to interpret Section 1367(d) in a counterintuitive and constitutionally provocative manner. Instead, this Court should construe Section 1367(d), in accordance with the canon of constitutional avoidance, as not applying to claims against nonconsenting state defendants.

II. Alternatively, Section 1367(d) should be understood to toll the limitations period only for pendent

state-law claims that are dismissed by the district court on grounds specified in the supplemental jurisdiction statute—for example, because "the claim raises a novel or complex issue of State law" or "the district court has dismissed all claims over which it has original jurisdiction," 28 U.S.C. 1367(c)(1) and (3). Section 1367(d) therefore does not apply to state-law claims that are dismissed for reasons independent of the supplemental jurisdiction statute, such as a lack of personal jurisdiction, inadequate service of process, failure to prosecute, or, as here, Eleventh Amendment immunity.

Such a construction of Section 1367(d) is consistent with the general statutory language, finds support in the legislative record, and limits the tolling rule to applications that further the goals of the supplemental jurisdiction statute. The congressional report accompanying the statute describes Section 1367(d) as applying only to claims dismissed "under this section." That restriction was expressly included in the text of Section 1367(d), as originally introduced, and does not appear to have been deleted for any substantive reason. Most commentators and courts agree that Section 1367(d) applies only to state-law claims that are dismissed for reasons specified in the supplemental jurisdiction statute, and not to claims that are dismissed on grounds unrelated to the statute, such as Eleventh Amendment immunity. Limiting the reach of Section 1367(d) to claims dismissed on the grounds specified in the statute avoids the constitutional difficulties identified by the Minnesota Supreme Court while promoting the proper functioning of the statute.

ARGUMENT

The Minnesota Supreme Court held that 28 U.S.C. 1367(d) is unconstitutional insofar as it tolls the statute

of limitations for state-law claims against state defendants. In reaching that conclusion, the Minnesota Supreme Court assumed that Section 1367(d) applies to every claim as to which the supplemental jurisdiction statute is invoked, without regard for whether the defendant is a State, as opposed to a private party, or whether the claim was dismissed on grounds specified in the statute, as opposed to other grounds. It made that assumption even though, in its view, such a construction rendered the statute unconstitutional. It thus failed to apply the "cardinal principle of statutory interpretation * * * that when an Act of Congress raises a serious doubt as to its constitutionality," courts should "first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Zadvydas* v. *Davis*, 121 S. Ct. 2491, 2498 (2001) (internal quotation marks and brackets omitted); accord, *e.g.*, *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 465-466 (1989); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring). Such a construction is, at a minimum, "fairly possible" here. Indeed, there is ample reason to conclude that Congress did *not* intend Section 1367(d) to toll the statute of limitations on state-law claims in the circumstances of this case.[1]

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[1] The canon of constitutional avoidance applies both when a statute raises serious constitutional questions in all applications

I. SECTION 1367, AND SECTION 1367(d) IN PARTICULAR, SHOULD BE UNDERSTOOD NOT TO APPLY TO STATE-LAW CLAIMS AGAINST NONCONSENTING STATE DEFENDANTS

Nothing in Section 1367 explicitly makes its provisions applicable to efforts to bring state-law claims against nonconsenting state defendants. Section 1367(a) provides a general grant of jurisdiction over state-law claims "that are so related to claims in the action within [the district courts'] original jurisdiction that they form part of the same case or controversy." 28 U.S.C. 1367(a). Section 1367(d) provides, in pertinent part, that "[t]he period of limitations for any claim asserted under subsection (a) * * * shall be tolled while the claim is pending and for a period of 30 days after it is dismissed." 28 U.S.C. 1367(d). Neither provision excludes, in so many words, state-law claims against nonconsenting state defendants. But both provisions should be construed, in accordance with the canon of constitutional avoidance, not to apply to such claims.

A. Interpreting Section 1367 To Apply To Nonconsenting States Raises Serious Constitutional Questions

Interpreting Section 1367 to apply to claims against non-consenting state defendants raises various constitutional difficulties. In the first place, if Section 1367(a)'s general grant of jurisdiction were read to authorize federal courts to adjudicate state-law claims against nonconsenting state defendants, that provision would violate this Court's constitutional holding in *Pennhurst II*. That decision explicitly held that the

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and, as here, when it raises such questions only in certain applications. See, *e.g.*, *Public Citizen*, 491 U.S. at 465-467.

Eleventh Amendment's "constitutional bar" to suits against nonconsenting States "applies to pendent claims." 465 U.S. at 120.

An interpretation of Section 1367(d) that would apply to nonconsenting state defendants likewise raises serious constitutional difficulties. In *Alden* v. *Maine*, 527 U.S. 706 (1999), this Court held that sovereign immunity principles inherent in the constitutional scheme prevent Congress, in the exercise of its Article I powers, from authorizing private suits against nonconsenting States in their own courts. Indeed, the Court explained that "a congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum," because "the immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself." *Id.* at 749; cf. *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 55 (1996) (holding that Congress, in the exercise of its Article I powers, cannot authorize private suits against nonconsenting States in federal court).

Congress would seem to interfere with a State's "sole control" over its immunity from suit in its own courts not only where, as in *Alden*, Congress authorizes a claim as to which a State has not waived its immunity at all, but also where Congress purports to expand the scope of a State's waiver of immunity. The latter may include Congress's expansion of the limitations period for claims against a State beyond the limitations period to which the State has consented. At a minimum, the question whether Congress may extend the limitations period for suits against a State in its own courts is a

serious one, which the Court should avoid reaching if possible.[2]

B. Interpreting Section 1367 As Inapplicable To Nonconsenting States Is Consistent With Congressional Intent And Avoids Constitutional Difficulties

A construction of Section 1367, and Section 1367(d) in particular, that excludes claims against nonconsenting state defendants cannot be said to be "plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575. There is no indication in the statutory text or the legislative record that Congress intended Section 1367(d) to toll the limitations period for such claims. To the contrary, Section 1367, as a whole, suggests that Congress intended to respect, not to challenge, the States' sovereign immunity.

Congress enacted the Judicial Improvements Act of 1990, of which the supplemental jurisdiction statute was a part, against the backdrop of this Court's sovereign immunity jurisprudence. The Court had made clear six years earlier in *Pennhurst II* that the Eleventh Amendment bars federal district courts from exercising pendent jurisdiction over state-law claims against

[2] This Court has characterized the limitations period in an Act of Congress authorizing suits against the United States as "a central condition" of the United States' waiver of sovereign immunity. *United States* v. *Mottaz*, 476 U.S. 834, 843 (1986); see *United States* v. *Williams*, 514 U.S. 527, 534 n.7 (1995) (noting that such limitations periods operate to "narrow the waiver of sovereign immunity"); cf. *Henderson* v. *United States*, 517 U.S. 654, 677 (1996) (Thomas, J., dissenting) ("[W]e have long held that a statute of limitations attached to a waiver of sovereign immunity functions as a condition on the waiver and defines the limits of the district court's jurisdiction to hear a claim against the United States.") (citing cases).

nonconsenting state defendants. Nothing in its text or legislative history suggests that Section 1367 was designed to attempt to overrule *Pennhurst II*. Indeed, although an early draft of a supplemental jurisdiction legislation contained a provision that purported to overrule *Pennhurst II*, that provision was not included in the legislation as introduced. See Arthur D. Wolf, *Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal*, 14 W. New Eng. L. Rev. 1, 48 (1992) (noting that "constitutional objections" had been raised to the provision); see also *id.* at 53 (text of provision).

As a general matter, even where Congress may constitutionally abrogate state sovereign immunity, Congress must "mak[e] its intention unmistakably clear in the language of the statute." *Dellmuth* v. *Muth*, 491 U.S. 223, 228 (1989). Section 1367 contains no such language.[3] Although the general jurisdictional grant in Section 1367(a) could be read to include claims against nonconsenting States, this Court has expressly warned against interpreting general grants of jurisdiction as congressional efforts to abrogate state sovereign immunity. See *e.g.*, *Blatchford* v. *Native Vill. of Noatak*, 501 U.S. 775 (1991); *Delmuth*, 491 U.S. at 231; *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 246 (1985). In

[3] To the contrary, Section 1367(a) specifies that it does not purport to create jurisdiction where it would conflict with the terms of another federal statute. See 28 U.S.C. 1367(a) (conferring jurisdiction over pendent claims, "[e]xcept as * * * expressly provided otherwise by Federal statute"). It is hard to conceive that the same Congress that declined to assert jurisdiction where it would conflict with a federal statute simultaneously would purport to assert jurisdiction where it would conflict with the Eleventh Amendment and sovereign immunity principles of the Constitution.

Blatchford, the Court declined to read a general grant of jurisdiction over suits brought by Indian tribes, 28 U.S.C. 1362, to apply to suits against nonconsenting States. What the Court said about Section 1362 in *Blatchford* applies with equal force to Section 1367(a): "the text is no more specific than § 1331, the grant of general federal-question jurisdiction to district courts, and no one contends that § 1331 suffices to abrogate immunity for all federal questions." 501 U.S. at 786. The better reading of a general jurisdictional grant, like Section 1367(a), is that it permits suits against a State where the State has waived immunity, or where Congress has elsewhere expressly abrogated that immunity, but does not permit suits against States in other circumstances. See *id.* at 786 n.4.

There is no more reason to conclude that Congress intended in Section 1367(d) to alter the scope of a nonconsenting State's immunity from state-law claims in state court than to conclude that Congress intended in Section 1367(a) to alter the scope of a nonconsenting State's immunity from state-law claims in federal court. The better reading is that Section 1367, in its entirety, has no application to nonconsenting States. The text of Section 1367(d) speaks generally of "any claim asserted under subsection (a)," and thus, like Section 1367(a), does not expressly apply to claims against nonconsenting state defendants. Nor is there any indication in the legislative record that any member of Congress understood Section 1367(d) to toll the limitations period for claims against such defendants.[4]

[4] The supplemental jurisdiction legislation is discussed in only one congressional committee report and in the record of only one congressional hearing. It was not the subject of any debate on the floor of the House or Senate during the consideration of the Judicial Improvements Act of 1990.

Indeed, Congress may well have assumed, in light of *Pennhurst II* and Section 1367(a)'s inapplicability to nonconsenting States, that no plaintiff would ever have an occasion to contend that Section 1367(d) applies to state-law claims brought against nonconsenting States. In view of this Court's holding in *Pennhurst II* that the Eleventh Amendment bars the adjudication of state-law claims against nonconsenting state defendants in federal court, Congress may have expected that plaintiffs would understand that such claims may be asserted, if at all, only in state court, and not in federal court under the supplemental jurisdiction statute. See Pet. App. A14 (affirming the state trial court's refusal to toll the limitations period on the state-law claims on equitable grounds because "under *Pennhurst [II]* it was clear the federal district court could not exercise jurisdiction over the supplemental MHRA claims").[5]

As is true of Section 1367(a), the general text of Section 1367(d) is sufficiently broad that it could be read to apply to nonconsenting States. In particular, it is possible to construe Section 1367(d) to extend the state statute of limitations against a nonconsenting state defendant in state court even when, as is the case here, the State has not consented to federal-court jurisdiction over the state-law claims and so Section 1367(a), properly understood, does not apply. But such an effort to modify the terms of a State's consent to suit in state

[5] Indeed, the assertion of federal power to extend the state statute of limitations against a nonconsenting state defendant would be particularly inappropriate in this case. Here, the federal courts lacked jurisdiction not only over the pendent state-law claims against respondents under *Pennhurst II*, but also, as *Kimel* made clear, over the federal claims.

court would be extraordinary and raise serious constitutional questions. Even if such interference with "state sovereign immunity is theoretically possible, there is no reason to believe that Congress ever contemplated such a strange notion." *Blatchford*, 501 U.S. at 785-786. The same factors that have made courts reluctant to infer a congressional intent to override States' immunity from suit in federal court counsel against inferring a congressional intent to override States' immunity from suit in state court. Section 1367 should thus be construed as having no application to nonconsenting States in order to avoid Eleventh Amendment and other sovereign immunity problems.

A state defendant may, of course, consent to a district court's exercise of supplemental jurisdiction over state-law claims, which may encompass consent to the tolling rule of Section 1367(d). Cf. *Blatchford*, 501 U.S. at 786 n.4. For example, where a district court has original jurisdiction over a claim as to which a State's immunity has validly been abrogated (*e.g.*, a claim under Title VII of the Civil Rights Act of 1964), the State may decide for reasons of efficiency to consent to supplemental jurisdiction over a closely related state-law claim. And, even if the State subsequently revokes its consent, and thereby forces the plaintiff to refile the state-law claim in state court, the revocation may not apply retroactively; Section 1367(d) may toll the limitations period for the period during which the case remained in district court with the State's consent. Absent the State's initial consent to the exercise of supplemental jurisdiction, however, Section 1367(d) should not be understood to apply to such claims.

In sum, Section 1367(d) may reasonably be construed, without conflicting with any expression of congressional intent, as not applying to state-law claims against non-

consenting state defendants. The Court should adopt such a construction of Section 1367(d), as opposed to the construction assumed by the Minnesota Supreme Court, in order to avoid serious constitutional doubts as to whether Congress may toll the statute of limitations on state-law claims against nonconsenting state defendants in state court.

II. SECTION 1367(d) DOES NOT APPLY TO STATE-LAW CLAIMS THAT ARE DISMISSED FOR REASONS UNRELATED TO THE TERMS OF THE SUPPLEMENTAL JURISDICTION STATUTE

Section 1367(d) may also be understood to apply only to state-law claims that are dismissed on grounds specified in the supplemental jurisdiction statute, and thus not to claims dismissed on other grounds, such as Eleventh Amendment immunity. That alternative construction of Section 1367(d) likewise would enable the Court to avoid reaching the constitutional question in this case.

A. The Text, Legislative Record, And Underlying Purpose Of The Supplemental Jurisdiction Statute Support A Narrow Reading Of Section 1367(d)

As noted above, Section 1367(d), in general terms, tolls the limitations period "for any claim asserted under subsection (a)." Section 1367(d) thus does not expressly confine its tolling rule to claims that are dismissed on the grounds stated in the supplemental jurisdiction statute. But, in light of the canon of constitutional avoidance, Section 1367(d) may fairly be construed to contain that limitation. Such a construction comports with the statutory text, finds support in the legislative record, and serves distinct congressional purposes.

First, the statutory text is compatible with the view that Section 1367(d) addresses the unique difficulties that arise when claims are dismissed on the grounds specified in the supplemental jurisdiction statute. Section 1367(d), notwithstanding its reference to "any claim," does not reach *every claim* asserted under Section 1367(a) that is dismissed for any reason. For example, if a district court dismisses a claim on the merits, the tolling rule clearly has no application. Professors Arthur Wolf and John Egnal, who assisted in drafting the supplemental jurisdiction statute (see House Report 27 n.13), made that point expressly in a submission for the record of a congressional hearing on the statute. "Of course," they explained, "if the court dismisses the non-federal claim on the merits, this subsection [*i.e.*, the tolling provision] is not intended to give the pleader a second chance that the pleader would not ordinarily have under state law." *House Hearing* 695, 697. Accordingly, Section 1367(d) does not reach every claim that its general terms might be construed to reach, and is clearly susceptible to a narrowing construction.

Second, the legislative record affirmatively indicates that Congress did *not* intend to toll the limitations period for pendent state-law claims that are dismissed for reasons unrelated to the supplemental jurisdiction statute. Instead, Congress contemplated that Section 1367(d) would apply only to claims dismissed *under that statute*.[6]

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[6] Whatever value legislative history has an interpretative tool as a general matter, it is clearly useful in confirming the general presumption, reflected in *Ashwander* and its progeny, that Congress legislates within constitutional limits. See, *e.g.*, *Benoni* v. *Boston and Maine Corp.*, 828 F.2d 52, 57 (1st Cir. 1987) (noting that consideration of "legislative history is not only appropriate, but mandatory" when it suggests a construction of a statute that avoids constitutional questions); see also *Securities and Exchange Commission* v. *Wall Street Publishing Inst., Inc.*, 851 F.2d 365, 368 n.5 (D.C. Cir. 1988) (relaxing normal rule against considering arguments not raised below "in light of our obligation to avoid unnecessary adjudication of constitutional claims when a statute's language *or legislative history* admits of a limiting construction") (emphasis added), cert. denied, 489 U.S. 1066 (1989).

As originally drafted and introduced in the 101st Congress, H.R. 5381, the legislation that contained the supplemental jurisdiction statute, tolled the limitations period for a pendent claim (there referred to as a "non-Federal claim") while the claim was pending in district court and for 30 days "after it is dismissed *under subsection (c)*." *House Hearing* 30 (quoting H.R. 5381, 101st Cong., 2d Sess. § 120(a) (1990)) (emphasis added). Subsection (c), in turn, directed that a district court "*shall* dismiss or remand the non-Federal claim if it is not a permissible claim under subsection (a)," *e.g.*, if the non-federal claim does not "arise out of the same transaction or occurrence or series of transactions or occurrences" as the federal claim. *Id.* at 29, 30 (emphasis added). Subsection (c) further directed that a district court "*may* dismiss or remand the non-Federal claim if * * * (1) the Federal claim is dismissed; (2) the non-Federal claim substantially predominates over the Federal claim; or (3) the non-Federal claim should be tried separately." *Id.* at 30 (emphasis added). No provision was made for the tolling of the limitations period in any other circumstance, *i.e.*, where the supplemental claim was dismissed for reasons other than those specified in subsection (c) (and, by cross-reference, subsection (a)). Thus, the tolling provision would have expressly applied only to state-law claims that were dismissed

either as not "permissible" under subsection (a) or for the discretionary reasons specified in subsection (c).

In the version of H.R. 5381 that Congress ultimately enacted, Section 1367(d) does not retain the explicit reference to claims "dismissed under subsection (c)." But nothing in the legislative record suggests that the reference was deleted in order to broaden the reach of the tolling provision.[7] To the contrary, the House Report accompanying the final version of H.R. 5381 confirms that subsection (d) "provides a period of tolling of statutes of limitations for any supplemental claim that is dismissed *under this section*." House Report 30 (emphasis added); see also 136 Cong. Rec. 36,291 (1990) (Sen. Grassley) (submitting identical explanation of tolling provision to Senate). The House Report thus does not contemplate that Section 1367(d) would toll the limitations period if a state-law claim was dismissed for reasons unrelated to the terms of the supplemental jurisdiction statute.

Third, this limiting construction of Section 1367(d) avoids serious doubt about the provision's constitutionality, yet permits Section 1367(d) to remedy a specific problem that arose in the wake of *Gibbs*. Specifically, this reading of Section 1367(d) allows district courts to exercise their discretion to dismiss pendent state-law claims that would more appropriately be adjudicated in state court, without concern that those claims would be time-barred when refiled in state court.

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[7] The final version of H.R. 5381 likewise does not retain the explicit directive included in the original version of subsection (c) that a district court dismiss any state-law claim that "is not a permissible claim under subsection (a)." But such a requirement, of course, remains implicit in the statute.

The common-law doctrine of pendent jurisdiction did not toll the statute of limitations for pendent state-law claims. In *Gibbs*, this Court emphasized that federal courts could exercise jurisdiction over pendent state-law claims as a matter "of discretion, not of plaintiff's right." *United Mine Workers of Am.* v. *Gibbs*, 383 U.S. 715, 726 (1996). Thus, the Court explained that a district court, in the exercise of its discretion, should dismiss pendent state-law claims, without prejudice, where warranted by considerations of comity, judicial economy, convenience, or fairness to litigants. *Id.* at 726-727; see *id.* at 726 (suggesting that dismissal would often be appropriate, for example, "if the federal claims are dismissed before trial" or "if it appears that the state issues substantially predominate").

The district courts' consideration of those factors often was skewed, however, by the concern that, if the court exercised discretion to dismiss a state-law claim, the claim might be deemed untimely if refiled in state court. That concern tended to overwhelm any factors that would counsel against retaining jurisdiction over a state-law claim. Indeed, several courts of appeals held it to be an abuse of discretion for a district court to dismiss pendent claims without taking into account whether the claim would be time-barred in state court.[8]

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[8] See, *e.g.*, *Giardiello* v. *Balboa Ins. Co.*, 837 F.2d 1566, 1571 (11th Cir. 1988); *Cooley* v. *Pennsylvania Hous. Fin. Agency*, 830 F.2d 469, 476 (3d Cir. 1987); *Henson* v. *Columbus Bank & Trust Co.*, 651 F.2d 320, 325 (5th Cir. 1981) (per curiam); *O'Brien* v. *Continental Ill. Nat. Bank & Trust Co.*, 593 F.2d 54, 64-65 (7th Cir. 1979). Some courts made a discretionary dismissal of pendent claims contingent upon the defendant's waiver of any applicable statute of limitations defense. See, *e.g.*, *Edwards* v. *Okaloosa County*, 5 F.3d 1431, 1435 n.3 (11th Cir. 1993); *Duckworth* v. *Franzen*, 780 F.2d 645, 657 (7th Cir. 1985), cert. denied, 479 U.S.

This Court expressed similar concerns in addressing the related question whether district courts could remand to state court, rather than dismiss, pendent state-law claims in cases originally filed in state court and then removed to federal court. The Court concluded that "a remand generally will be preferable to a dismissal when the statute of limitations on the plaintiff's state-law claims has expired before the federal court has determined that it should relinquish jurisdiction over the case." *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 351-352 (1988). In such a case, the Court observed, dismissal "may work injustice to the plaintiff," because "a dismissal will foreclose the plaintiff from litigating his claims." *Id.* at 352.[9] As a consequence of concerns about leaving plaintiffs without a state-law remedy, the district courts would retain jurisdiction over cases that, apart from those concerns, properly belonged in state court. *Id.* at 352 n.10.[10]

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816 (1986); *Financial Gen. Bankshares, Inc.* v. *Metzger*, 680 F.2d 768, 778 (D.C. Cir. 1982).

[9] Congress subsequently enacted legislation to make a remand mandatory, rather than discretionary, when, as in *Cohill*, subsequent events deprive the district court of subject-matter jurisdiction. See 28 U.S.C. 1447 (1994 & Supp. V 1999).

[10] A subcommittee of the Federal Courts Study Committee, after examining the practice of the district courts under *Gibbs*, noted that "most courts retain jurisdiction over state claims regardless of their complexity, novelty, or predominance," except where all federal claims were dismissed before trial. 1 Federal Courts Study Committee, *Working Papers and Subcommittee Reports* (Report of the Subcommittee on the Role of the Federal Courts and Their Relationship to the States) 561-562 (July 1, 1990). The subcommittee recommended that any supplemental jurisdiction statute direct the district courts to dismiss state-law claims in all of those circumstances. *Id.* at 562. Neither the recommendation of the Federal Courts Study Committee nor the draft statute

The proponents of the supplemental jurisdiction legislation expressed related concerns about the district courts' retaining pendent claims that might more appropriately be adjudicated in state court. For example, Judge Joseph F. Weis, Jr., the chairman of the Federal Courts Study Committee, urged Congress that "supplemental jurisdiction not be used to let the tail [of a federal-law claim] wag the dog [of a case in which state-law claims predominate]." *House Hearing* 95. "Thus," said Judge Weis, "when a state claim predominates, the district court should be authorized and encouraged to decline the exercise of supplemental jurisdiction," because "[t]o proceed in the face of state claim predominance would be an affront by a district court to considerations of comity and federalism." *Ibid.*

Section 1367(d) allows district courts to assess whether to retain jurisdiction over state-law claims free from concerns about whether the claims, if dismissed, could be timely filed in state court. It, therefore, eliminates the incentive for district courts to retain jurisdiction over state-law claims that, for reasons of comity or otherwise, are better suited for adjudication in state court. See John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. Davis L. Rev. 855, 945 (1998) ("Congress clearly intended subsection 1367(d) to facilitate discretionary dismissal under subsection 1367(c) by relieving courts of concerns about the inequitable consequences of state limitations law barring the dis-

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prepared by its Subcommittee on the Role of the Federal Courts specifically addressed the tolling of the statute of limitations for state-law claims. The tolling provision was contained in the draft supplemental jurisdiction legislation submitted to Congress by Professors Wolf and Egnal. See *House Hearing* 686-687.

missed claim from refiling."). No comparable purpose is served by giving the benefit of tolling under Section 1367(d) to a plaintiff whose state-law claim is dismissed for mandatory reasons unrelated to the supplemental jurisdiction statute, such as lack of personal jurisdiction, improper service, failure to state a claim, or Eleventh Amendment immunity.[11]

Finally, as noted, a construction of Section 1367(d) that limits tolling to claims dismissed under the supplemental jurisdiction statute avoids the serious constitutional questions raised by a construction that would allow tolling for claims dismissed on Eleventh Amendment grounds. Indeed, apart from the special concerns raised by a construction that could apply Section 1367(d) to expand the scope of a State's waiver of sovereign immunity, there are reasons to favor a narrow construction. Even in cases involving only private litigants, "States have an interest in the prompt and efficient resolution of controversies based on state law." *Cohill*, 484 U.S. at 353. While tolling the state limitations period is justified in aid of federal court jurisdiction to address the unique problems created by pendent jurisdiction, there is less justification for tolling the state limitations period when the state-law claims are dismissed for defects having nothing to do with the supplemental jurisdiction statute. In light of the legislative record and the fact that Section 1367(d) accomplishes its key purposes even if limited to claims

[11] Statute of limitations concerns figure prominently in cases involving pendent claims, because the district court is required to consider whether to retain discretionary jurisdiction over pendent claims "throughout the litigation." *Cohill*, 484 U.S. at 351; see also *Gibbs*, 383 U.S. at 727. Dismissals on grounds not related to the supplemental jurisdiction statute, by contrast, are often the result of threshold inquiries that involve no element of discretion.

dismissed under the statute, there is no reason to adopt a broad and constitutionally problematic construction of Section 1367(d).

B. Most Courts And Commentators Have Read Section 1367(d) Narrowly

Wholly apart from any concern for avoiding difficult constitutional questions, most commentators view Section 1367(d) as not applying to pendent state-law claims that are dismissed for reasons unrelated to the terms of the supplemental jurisdiction statute. At least two courts have also expressed that view.

Some commentators have interpreted Section 1367(d) to apply only to state-law claims that are dismissed for the discretionary reasons stated in Section 1367(c). For example, one leading treatise, after acknowledging that "in this respect, as in others, § 1367 could have been more clearly drafted," concludes that "the tolling provision of (d) should be read as coming into play only if the court exercises its discretion, under § 1367(c), to dismiss a supplemental claim of which it has jurisdiction under subsection (a)." 13B Charles A. Wright et al., *Federal Practice and Procedure* § 3567.1, at 46 n.51 (Supp. 2001). Thus, if a district court "dismisses a claim because that claim is not properly within the court's jurisdiction, § 1367(d) should have no[] application." *Ibid.* Similarly, Professor John B. Oakley observes that, although the text of Section 1367(d) creates some "uncertainty" as to its reach, a "close reading of the legislative history conclusively supports" construing Section 1367(d) to apply "only to 'any claim properly asserted under subsection (a)' that the district court dismissed not for lack of supplemental jurisdiction, but rather because the district court elected not to exercise supplemental jurisdiction for one of the discretionary

reasons permitted by subsection 1367(c)." Oakley, *supra*, 31 U.C. Davis L. Rev. at 945; see also 16 *Moore's Federal Practice* § 106.66[3][c] (3d ed. June 2001) ("Under Section 1367, if the claim is *validly* within the court's supplemental jurisdiction under subsection (a), the period of limitations is tolled while the claim is pending and for a period of 30 days after it is dismissed unless state law provides for a longer tolling period.") (emphasis added). The American Law Institute (ALI) shares the view that Section 1367(d) "tolls the period of limitations only as to supplemental claims dismissed discretionarily because the district court declines to exercise supplemental jurisdiction." *Federal Judicial Code Revision Project, Tentative Draft No. 2*, at 99 (1998) (approved at the ALI's annual meeting on May 14, 1998).[12]

Two courts have also concluded that Section 1367(d) applies only to state-law claims dismissed for one of the reasons stated in Section 1367(c). See *Ovadia* v. *Bloom*, 756 So. 2d 137, 139 (Fla. Dist. Ct. App. 2000) (Section 1367(d) does not apply when the federal action was dismissed for lack of complete diversity); *Parrish* v. *HBO & Co.*, 85 F. Supp. 2d 792, 796-797 (S.D. Ohio 1999) (Section 1367(d) applies only to claims dismissed under Section 1367(c)).

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[12] The ALI has drafted a revised supplemental jurisdiction statute that would, among other things, "expand[]" the tolling provision "to embrace supplemental claims dismissed because the district court lacks subject-matter jurisdiction as well as supplemental claims dismissed because the district court has declined to exercise its supplemental jurisdiction." *Federal Judicial Code Revision Project, Tentative Draft No. 2*, at 98-99; see *id.* at 98 (draft legislation providing for tolling of limitations period for "any supplemental claim dismissed because the district court lacks or declines to exercise supplemental jurisdiction").

Some commentators have concluded that Section 1367(d) tolls the limitation period not only for pendent state-law claims dismissed on the discretionary grounds provided in Section 1367(c), but also for pendent claims dismissed because the prerequisites of Section 1367(a) or (b) have not been met. In their view, the tolling provision would apply to a pendent claim that was dismissed because, for example, the pendent claim was not sufficiently related to a claim over which the court has original jurisdiction. See, *e.g.*, Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 Ariz. St. L.J. 849, 985 (1992) ("[I]t would appear that the intent of the drafters was to extend tolling protection to a dismissed supplemental claim, but only when the dismissal results from the failure of the claim to satisfy one of the supplemental jurisdictional requirements of § 1367(a)-(c) and not because of some other defect.").

The majority view, however, and perhaps the better one, is that Section 1367(d) tolls the limitations period only for claims dismissed for the discretionary reasons set forth in Section 1367(c). But the Court need not definitively resolve that question because, whether or not Section 1367(d) applies to dismissals under Section 1367(c) alone or to dismissals for failure to meet the prerequisites of Section 1367(a) and (b) as well, it does not apply to pendent claims, such as those here, that are dismissed for independent reasons.[13]

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[13] We are not aware of any decision, other than the decision of the Minnesota Court of Appeals in this case, holding that Section 1367(d) applies to state-law claims that are dismissed for reasons unrelated to the terms of the supplemental jurisdiction statute. But see *Stevens* v. *ARCO Management of Washington D.C., Inc.*, 751 A.2d 995, 997-1002 (D.C. 2000) (endorsing, in dicta, the reason-

C. A Narrow Construction Of Section 1367(d) Does Not Foreclose The Application Of State Tolling Rules To State-Law Claims

An interpretation of the tolling provision that encompasses only claims dismissed under Section 1367, and not claims dismissed under other sources of law, does not leave plaintiffs who mistakenly file state-law claims in federal court without any possibility of relief from the running of a statute of limitations. Such a construction simply leaves full responsibility for providing such relief with the States.

It is quite common for state law to provide for the tolling of the limitations period for claims that are initially filed in the wrong court. See McLaughlin, *supra*, 24 Ariz. St. L.J. at 982-983 (noting that "a number of states provide for statutory tolling when an action is timely commenced in one court and is thereafter dismissed without prejudice," and that "[s]till other states have no statutory provision for tolling, but permit tolling on a case-by-case basis under the doctrine of equitable tolling"); see also *Burnett* v. *New York Cent. R.R.*, 380 U.S. 424, 431-432 & n.9 (1965) (noting state "saving" statutes). Section 1367(d) reflects Congress's awareness of such state tolling rules. See 28 U.S.C. 1367(d) (tolling the statute of limitations for 30 days "unless State law provides for a longer tolling period").

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ing of the Minnesota Court of Appeals). A few commentators have taken that view. See, *e.g.*, Brian A. Beckcom, *Pushing the Limits of the Judicial Power: Tolling State Statutes of Limitations Under 28 U.S.C. § 1367(d)*, 77 Tex. L. Rev. 1049, 1074 n.168 (1999) ("§ 1367(d) would toll state statutes of limitations regardless of the reason for dismissal, unless the claim is dismissed on the merits").

A State may, of course, decide to apply its own tolling provisions to claims dismissed in federal court on Eleventh Amendment grounds. Indeed, state tolling provisions may provide a degree of protection to plaintiffs in some of the circumstances suggested by petitioners, such as where a state defendant engages in conduct indicating consent to federal court jurisdiction over a pendent state-law claim, and then asserts an Eleventh Amendment objection after the statute of limitations has run on the claim. Such an approach allows state courts to address inequities but leaves control over the terms of a State's waiver of sovereign immunity with the State itself.[14]

CONCLUSION

The judgment of the Supreme Court of Minnesota should be affirmed based on a construction of Section 1367 that avoids serious constitutional difficulties.

Respectfully submitted.

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[14] Plaintiffs, of course, also may seek to protect themselves by simultaneously filing suit in federal and state court and asking the state court to stay its hand until the federal court has determined whether to hear the pendent claim on the merits.

APPENDIX

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Section 1367 of Title 28 of the United States Code provides:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental

jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

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No. 00-1514

In the Supreme Court of the United States

Lance Raygor and James Goodchild,

Petitioners,

v.

Regents of the University of Minnesota,

Respondent.

ON WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

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I. INTRODUCTION

Respondents do not identify any injury that was occasioned by the claimed violation of the university's sovereign immunity. Under *Pennhurst State School Hospital v. Halderman*, 465 U.S. 89 (1984)(*Pennhurst II*), a state is accorded the constitutional prerogative to object to defending a state law claim in federal court. That prerogative has been respected in this case; when the university filed a timely motion seeking dismissal of the MHRA claim, the district court promptly granted its request. The first action raising the MHRA claim was filed within the requisite 45 day period; there is no assertion that the university's ability to collect or preserve evidence was in any way affected by the date on which the second action was begun. Although the MHRA claim was initially commenced in federal court, that was a necessary part of a legal regime which affords state agencies the ability to decide whether such claims will be heard in federal or state court. Had the university wished to do so, it could within a few weeks of the original federal action have forced the refiling of the state claim simply by making a motion to dismiss that supplemental claim.

The only practical consequence of the operation of section 1367 in this case was that university lawyers, in order to exercise the defendants' prerogatives under *Pennhurst II*, were required to file in federal court a motion to dismiss the MHRA claim. That portion of the university's July 1997 motion was a mere eight sentences long.[1] The necessity of filing such a request had no impact on the assets of the university, and cannot plausibly be characterized as an affront to the dignity of the state of Minnesota.

[1] Defendant's Memorandum of Law In Support Of Its Motion to Dismiss, pp.8-9.

II. THE SOVEREIGN IMMUNITY OF THE STATES IS A CONSTITUTION-BASED DEFENSE, NOT A LIMIT ON THE SUBJECT MATTER JURISDICTION OF FEDERAL COURTS

The sovereign immunity accorded to the states by the Constitution is not an absolute prohibition against actions in federal courts against states; it applies only to nonconsenting states. Thus sovereign immunity is (where applicable) a defense which a state agency in its discretion may invoke in those cases where it objects to the exercise of federal jurisdiction over a particular claim. If the Eleventh Amendment or sovereign immunity placed claims against states outside the subject matter jurisdiction of federal courts, state defendants could not by consent confer such jurisdiction on those courts. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986).

The same principles apply to supplemental claims based on state law. *Pennhurst II* does not hold that supplemental claims against state agencies are outside the subject matter jurisdiction of federal courts. *Pennhurst II* merely accords to state agencies a right, which they may or may not elect to exercise, to insist that federal courts dismiss such supplemental claims.

The amicus states correctly observe that lawyers for state defendants routinely make case-by-case decisions regarding whether or not to assert sovereign immunity in federal actions. (Brief of States of Maryland, et al., p. 15)("States Amicus Br."). The United States explains why state attorneys often conclude that the interests of a state defendant are best served by not asserting sovereign immunity to bar a particular supplemental claim. (U.S.Br. 18). Even where an action involving federal and state claims has initially been filed in state court, state attorneys at times conclude that the

defendant's interests would be best served by removing the case to and trying it in federal court.[2]

A state which wants a district court to dismiss a claim based on sovereign immunity must ordinarily file a motion under the Rule 12(b)(6), as the university did in July 1997. *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 389 (1998). A state agency's decision not to file such a motion at the very outset of the litigation does not forfeit its sovereign immunity; the Federal Rules themselves set no deadline for such a dispositive motion, although a pre-trial order may well do so. But at least until (and unless) such a motion is filed, a state agency stands before the federal court like any other defendant, and remains within its authority.

A timely meritorious motion to dismiss on sovereign immunity grounds will compel the federal court to dismiss the claim in question. But such a motion does not operate retroactively to vitiate the court's earlier jurisdiction over the claim. (If, for example, a claim had been tried to judgment, a state agency could not invoke its immunity after-the-fact to invalidate that judgment). And such a motion does not mean that the filing of the original complaint, although entirely permissible at the time, becomes nunc pro tunc improper.

The United States properly acknowledges that section 1367(d) would (and could constitutionally) apply to this case if the university attorneys had initially consented in some express manner to the exercise of federal jurisdiction, and had only later revoked that consent.

> [E]ven if the State subsequently revokes its consent, and thereby forces the plaintiff to refile the state-law claim in state court, the revocation may not apply

[2] Attorneys for the University of Minnesota did that, for example, in *McDonell v. University of Minnesota Hospital and Clinic*, No. 96-CV-662 (D.Minn.) and *Dell v. University of Minnesota*, No. 93-CV-501 (D.Minn.).

> retroactively; Section 1367(d) may toll the limitations period for the period during which the case remained in district court with the State's consent.

(U.S. Br. 18). In this case the university took a slightly different approach, making no effort to obtain dismissal of the supplemental claim until it concluded, ten months after the filing of the complaint, that dismissal would be in its interests.[3] That difference is without legal or constitutional significance. The rights afforded to petitioners by section 1367(d) attached when the complaint was initially filed, and were not retroactively extinguished by respondents' subsequent motion to dismiss.

Congress can establish reasonable regulations of the process under which a state opts to exercise in federal court its right to assert its sovereign immunity defense. Section 1367(d) merely assures that state agencies will not derive an unfair advantage from a system which affords the states themselves ultimate control over whether supplemental state law claims will be heard in federal or state court. (See Pet. Br. 32-36). The operation of section 1367(d) is no different in practice than an order, similar to those issued by federal courts prior to the enactment of section 1367(d), forbidding attorneys for the university from asserting a statute of

[3] The university emphasizes that it did refer to the Eleventh Amendment in its answer. But this merely served to protect the university from an argument that it had waived that defense. *See* F.R.Civ. Pro. Rule 8(c). The answer did not specify which claims it contended were barred by that defense. (Pet. Br. 4).

In the federal courts a defendant which wants the court to dismiss a claim must ordinarily file a motion requesting that action. The university does not suggest that the district judge somehow erred in not dismissing the supplemental claim in the fall of 1996 merely because the answer had mentioned the Eleventh Amendment.

limitations defense if a dismissed state law claim were refiled within thirty days. (See Pet. Br. 17-18).

III. SECTION 1367(d) RESOLVES A SERIOUS CONSTITUTIONAL PROBLEM

A. Due Process

As we noted in our opening brief (Pet. Br. 45), the procedural morass created by state law prior to the enactment of section 1367(d) often violated due process. State law generally required (as it does today) that any federal litigant with a related state law claim include that claim in his or her federal action. If, however, the federal litigant complied, and the supplemental state claim were subsequently dismissed on procedural grounds, the plaintiff would often be barred by the statute of limitations from refiling in state court. The interaction of a state's claim preclusion rules and statute of limitations could prohibit a plaintiff from ever obtaining any hearing on the merits of his or her state law claim.

Procedural schemes such as this violate due process. "[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). Due process requires that a plaintiff be accorded a meaningful opportunity for a hearing on the merits of such a claim. *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950). In *Logan* Illinois law required that an individual with a claim under the state employment discrimination statute file a charge with the state Fair Employment Practices Commission. The complainant could seek redress from the Commission, and, if dissatisfied by that agency's order, could obtain judicial review. But in that case Logan's right to redress had been forfeited because the Commission missed a

deadline for convening a conference of the parties. This Court held that this scheme violated due process.

> [I]t has become a truism that "some form of hearing" is required before the owner is finally deprived of a protected property interest . . . . Here . . . the state system itself . . . destroys a complainant's property interest, by operation of law . . . . Logan is challenging, not the Commission's error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards.

455 U.S. at 433-36 (Emphasis in original).

Prior to 1990, in the absence of a state tolling rule, state law destroyed in a similar manner state law claims of federal litigants. The claimants were required to include those state claims in their federal complaints and, if the federal judge ultimately dismissed the state claims, state limitations law then barred them. The due process problem is all the more severe when a state claim is dismissed because a state defendant opts to invoke its sovereign immunity. In such cases the survival of the plaintiff's property interests turns not on the disinterested actions of a state administrative agency or a federal judge, but on the all too interested discretion of the defendant itself.

The university and several amici insist that the states have plenary authority to set the conditions under which they will waive sovereign immunity. But the result in *Logan* would assuredly have been the same if the defendant in question had been an Illinois state agency rather than a private employer. The conditions a state attaches to its waiver of immunity are limited by the Fourteenth Amendment. Minnesota could not condition its waiver on a showing that a plaintiff was white, or that she had contributed to the

governor's last campaign. Nor could it create a process for adjudicating claims against the state in which the state lawyers were allowed to introduce evidence and argument at a secret hearing from which a plaintiff was excluded, or in which the plaintiff and his or her attorney were forbidden to offer evidence of their own. Even facially neutral procedural rules are unconstitutional where, as in *Logan*, they operate in combination to deny a claimant due process.

The decision in *Logan* does not require that a claimant show to a legal certainty that there was no conceivable procedure under which he or she might have been able to obtain a hearing on the merits. Although there was a possibility that the plaintiff in *Logan* could have proceeded under another state law, it was at best "not clear" that he could do so. 455 U.S. at 435 n. 9. Such a "speculative . . . remedy" was inherently insufficient to solve the due process problem. *Id.*

In the instant case the United States suggests that plaintiffs might "seek to protect themselves" by filing simultaneous federal and state actions and asking for a stay of the latter. (U.S. Br. 31 n. 14). The United States does not, however, assert that either Minnesota or any other state would actually permit a plaintiff to maintain such a backup state lawsuit. The states' amicus brief suggests plaintiffs might attempt to proceed in both state and federal court, "subject to the inevitable procedural subtleties raised by interrelated dual proceedings." (States Amicus Br. p. 4). This is an artful way of acknowledging that either the federal or state courts might well forbid such simultaneous actions; it is entirely likely that the twenty-four attorneys general who in this Court offer this tactical suggestion would in the lower courts adamantly object if a plaintiff actually brought such duplicative proceedings. Several state organizations defend the concatenation of state claim preclusion and limitations rules as an ingenious method of reducing state expenses and

judicial workload[4]; this argument necessarily assumes that the states would save time and money because there would in practice be no way for plaintiffs to obtain a hearing.

Respondents argue that a plaintiff could solve the statute of limitations problem by filing a federal claim in federal court and a simultaneous state claim in state court. (R.Br. 5 n.4, 21). But such a tactic would run headlong into state law regarding claim preclusion, claim splitting, and election of remedies. In 1997 in this very case, when petitioners were attempting to pursue federal and state claims in federal and state courts, respectively, the university emphatically objected that Minnesota law forbade such a course of action. (Pet. Br. 7, 7n. 7). Claim preclusion principles would ordinarily prevent a plaintiff from obtaining hearings on a federal action in federal court and a state action in state court. If the federal action were resolved first, the state action would then be barred by res judicata, since the plaintiff would have failed to include the state claim in his or her federal action. For similar reasons, if the state action were resolved first, res judicata would bar the federal law claim.[5] We object, not to the possibility that plaintiffs may ultimately have to proceed in two forums, but to the absence of a clear procedure under which plaintiffs could do so without ultimately forfeiting one or the other of their claims.

The realities of litigation are that attorneys for state defendants have a formidable array of arguments--res judicata, claim splitting, election of remedies, sovereign

[4] Brief of the National Conference of State Legislatures, p. 26.

[5] The suggestion of the United States entails just this risk. If a plaintiff filed a precautionary state action, but the state court rejected a request that that lawsuit be stayed, the decision of the state court on the state claim, even if favorable, would bar further proceedings in the federal court, thus forfeiting the federal claim. That risk is particularly serious where, as here, only the federal court would afford the plaintiff a jury trial.

immunity, statutes of limitations--with which to defeat any tactic which a federal litigant might employ in an attempt to obtain a hearing on a state law claim. The brief signed by twenty-four state attorneys general refuses to relinquish any of these weapons. Although the brief invites this Court to assume that plaintiffs could simultaneously file their federal claims in federal court and their state claims in state court, not one of these attorneys general was willing to bind his or her state by including in the brief a representation that that tactic would indeed be legally permissible in his or her state[6]. The requirements of due process are not satisfied by a procedural shell game in which the hapless plaintiff is always told that he or she has chosen the wrong forum.[7]

[6] States Amicus Br. 21 argues:

> "Ordinary rules regarding claim preclusion, claim splitting, and election of remedies may bar plaintiffs from bifurcating actions brought against other private entities. It is far from clear, however, that those rules would apply when States are the defendants."

The states do not, however, adduce a single argument as to why they too could not invoke those same "ordinary rules" against a plaintiff. That failure is undoubtedly deliberate; the assertion of any such argument in this Court could preclude the signatory attorneys general from invoking those ordinary rules in lower court litigation. In any event, such a lack of clarity is fatal under *Ingram*.

[7] As Justice Rutledge noted in *Marino v. Ragen*, 332 U.S. 561 (1947)(concurring opinion), the opportunity to a judicial hearing is not satisfied by "a procedural morass" in which it is likely that "the case will go off on the procedural ruling that the wrong one of several possible remedies have been followed." 332 U.S. at 564-65. The right to a hearing is denied if "no remedy exists, or . . . every remedy is so limited as to be inadequate, or . . . the procedural problem of selecting the proper one is [too] difficult." 332 U.S. at 569-70. No meaningful opportunity to be heard is afforded if "at the outset a petitioner cannot intelligently select the proper way." *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971) (*quoting* Justice Rutledge's opinion in *Marino*.)

As we explain below, the limited impact of section 1367(d) does not constitute an abrogation of a state's sovereign immunity. Even if this Court should conclude otherwise, section 1367(d) is a congruent and proportional response to the due process problem posed by state law. *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001). No party questions the very real procedural dilemma faced by federal judges prior to the enactment of section 1367(d). Outside of the states with tolling statutes, federal plaintiffs whose supplemental claims were dismissed were likely to be denied a state court hearing (and, thus, any hearing at all) on the merits of those claims. Congress was not obligated to defer legislative action because of the speculative possibility--unrealized to this day--that states without tolling statutes would eventually fashion some other clear and certain method for obtaining a hearing on state claims related to a federal law claim in federal court.

Section 1367(d) applies only to state claims that were in fact brought first in federal court, and will have little if any effect on states that have solved the due process problem by adopting their own tolling statutes. Section 1367(d) requires that the supplemental claim have been filed in federal court within the deadline proscribed by state law; it tolls the limitations period, but does not revive claims already time-barred when the federal suit was begun. If it wishes to do so, a state can reduce the tolling period to no more than a few weeks by the simple expedient of immediately filing a motion to dismiss the supplemental claim on grounds of sovereign immunity.

B. Unconstitutional Condition

Absent tolling, a federal claimant can at least ordinarily be precluded at the whim of the defendant from getting any hearing for a state law claim against a state agency.

Respondent suggests that such a prohibition is nonetheless constitutional, because plaintiffs can still obtain a hearing for those state claims if they will relinquish their right to bring their federal claims in federal court. As we noted in our opening brief, such a proposed alternative imposes an unconstitutional condition on the state's waiver of sovereign immunity.

An individual's right to seek redress in the federal courts is protected by the First Amendment[8]. Litigants forced to relinquish litigation of civil rights claims in federal court would often lose their Seventh Amendment right to trial by jury; Minnesota, for example, provides no comparable right in civil actions. *Compare* 42 U.S.C. § 1981a(c) *with* Minn. Stat. § 363.14(2). Federal civil rights laws generally guarantee plaintiffs the right to sue in federal court; state interference with that right would violate the Supremacy Clause.

In *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967), this Court invalidated under the Supremacy Clause a similar form of interference with claims under the NLRA. In that case Florida had denied unemployment compensation to a worker because she had filed a charge with the NLRB.

> The National Labor Relations Act . . . is of course the law of the land which no state law can modify or repeal. . . . [C]oercive actions which the Act forbids employers . . . to take are likewise prohibited from being taken by the states. The action of Florida here, like the coercive actions which employers . . . are forbidden to engage in, has a direct tendency to frustrate the purpose of Congress to leave people

[8] *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001); *In re Primus*, 436 U.S. 412 (1978); *Brotherhood of R.R.Trainmen v. Virginia*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

free to make charges of unfair labor practices to the Board.

389 U.S. at 239.

Minnesota could not condition state benefits on a recipient's agreement to forgo bringing any lawsuits in federal court. The University of Minnesota could not, for example, dismiss petitioners because they sued the university in federal court, or strip students of their scholarships for having done so. Similarly, although the state is under no obligation to waive its sovereign immunity, it cannot limit such waivers to plaintiffs who had contributed to the governor's reelection campaign, see *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 717-18 (1996), or who had permitted the state to build bike pathways on their land. See *Bolan v. City of Tigard*, 512 U.S. 374 (1994). No state could include in its waiver statute a provision that "Any person who files in federal court any civil action shall forfeit any state law claim arising out of the same transaction or occurrence." In the absence of some tolling provision, the practical effect of state law is often essentially the same.

IV. SECTION 1367(d) APPLIES TO STATE DEFENDANTS

A. Section 1367(d) Should Be Presumed To Apply Where Needed To Avoid A Serious Constitutional Problem

"[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). That rule

of construction supports interpreting section 1367(d) to apply to claims against state defendants.

As we explained above, absent the application of section 1367(d) there would indeed be serious constitutional problems in states without their own tolling provisions. Although the new constitutional arguments advanced by respondents are not frivolous, the constitutional requirements of *Logan* and *Nash* are already well established. It would make no sense to adopt a construction of section 1367(d) that would assuredly lead to a violation of the due process rights of plaintiffs in order to avoid deciding whether the alternative construction might not violate the constitutionally protected immunity of the states. The fundamental purpose of the rule of construction in *DeBartolo* is to protect constitutional values, not to simplify opinion writing.

The circumstances of this case present some tension between the rights of due process and freedom of speech guaranteed by the Fourteenth Amendment, and the autonomy of the states implicitly protected in certain respects by the Constitution. Faced with such a possible conflict, the United States appears to support a rule of construction that would attach the highest priority to assuring that states' rights remain sacrosanct. That may be a fair reading of the priorities underlying the Constitution when it was originally ratified, but in adopting the Reconstruction Amendments the nation rewrote the constitutional priorities to give primacy to the protection of individual rights.

B. Section 1367(d) Is Not Limited To Dismissals Under Section 1367(c)

The terms of section 1367(d) state that its tolling provision applies to "any claim asserted under subsection (a)". (Emphasis added). The United States urges this Court to disregard the literal language of section 1367(d), and to

limit its application to supplemental claims that were dismissed "under section 1367" or, even more narrowly, to those that were dismissed under section 1367(c). It is difficult to understand how either proposed interpretation of section 1367(d) can be reconciled with the government's insistence that that tolling provision would indeed apply to a state that had temporarily consented to the exercise of federal jurisdiction. (U.S.Br. 18).

The government asserts, first, that section 1367(d) could not possibly apply, as written, to "any claim asserted under subsection (a)". The United States relies for this premise on a single sentence excerpted from a lengthy attachment to one of dozens of letters buried in a 400 page printed appendix to the House Hearings[9]. The government offers no reason to believe that any member of Congress had ever even read the document in question. This Court has never regarded such peripheral elements of a congressional hearing as sufficient to overcome the actual language of a statute.[10]

The United States and respondents rely heavily on a sentence in the House Report stating that subsection (d) provides tolling for claims "dismissed under this section." (H.R.Rep. 101-734, p. 30). That sentence might in isolation support a narrow reading of subsection (d), although by itself

[9] The documentary appendix consumes the majority of the printed hearings. The author of the letter involved did not testify at the actual hearing.

[10] The passage quoted by the United States does not, as it suggests, mean that the tolling provision would not apply to a dismissal of the supplemental claim on the merits. It states, not that the pleader could never refile in state court, but only that subsection (d) would not "give the pleader a second chance that the pleader would not ordinarily have under state law." House Hearing, 695, 697 (Emphasis added). The evident meaning of this remark is only that the tolling provision would not alter the res judicata effect in state court of the federal judge's decision on the merits.

this would be far too little to overcome the actual language of the statute. But the very next sentence of the Report describes section 1367(d) in broader terms. "The purpose is to prevent the loss of claims to statutes of limitations where state law might fail to toll the running of the period of limitations while a supplemental claim was pending in federal court." (*Id.*). That purpose is implicated when a state law claim is dismissed for any reason, and thus supports a literal interpretation of section 1367(d).

An early draft of subsection (d) expressly limited tolling to supplemental claims dismissed under subsections (a) and (c). In framing the final version, however, Congress deliberately deleted this limitation. The United States urges the Court to read the omitted limitation back into the statute. Because the legislative history is silent about this deletion, the government argues, Congress could not have meant the change in the statutory language to entail a change in the meaning of the law. (U.S. Br. 22). The normal rule of construction, however, is that the rejection of such limiting language bespeaks a rejection, not an endorsement, of the limitation in question.

Even if subsection (d) were limited to dismissals under section 1367, it would still apply in this case. As the government correctly acknowledges, dismissal "under section 1367" would encompass dismissals under subsection (a). Although section 1367(a) does not exclude all claims against state agencies, it does not encompass a supplemental claim against a state which has asserted its sovereign immunity. (See U.S. Br. 14-15). Thus in a case such as this, petitioners' supplemental claim was within the scope of section 1367(a) when the complaint was first filed, but was no longer authorized by subsection (a) once the university filed its motion to dismiss the claim on sovereign immunity grounds. The dismissal of a claim on that basis would indeed be a dismissal under section 1367 itself.

After repeatedly arguing that section 1367(d) applies to any dismissal under section 1367 as a whole, the United States inexplicably changes position and announces that the "better" view is that section 1367(d) actually applies only to dismissals under subsection (c). (U.S. Br. 29). That interpretation would, of course, be at odds with even the government's reading of the House Report, and would be narrower than even the early draft of section 1367(d) itself. For this preferred interpretation the United States relies on neither the text or the legislative history of section 1367(d), resting instead primarily on a single footnote in the 2001 pamphlet supplement to volume 13B of Wright's Federal Practice and Procedure. (U.S.Br. 27).

Limiting section 1367(d) in this manner would have several implausible consequences. First, it would bar tolling where the state claim was dismissed because the court concluded it did not derive from the same common nucleus of operative fact as the federal claim, a frequent and often hotly disputed issue regarding supplemental claims. Second, it would bar tolling where the underlying federal claim was ultimately dismissed for lack of subject matter jurisdiction. In either situation the framing of the original complaint would often have been entirely reasonable, and in the first situation inclusion of the state claim may have been a necessary precaution to avoid a claim preclusion argument in state court. Third, if the reason for the dismissal controlled the availability of tolling, the federal court could assure tolling by expressly relying on subsection (c) in its order of dismissal. The parties would attempt to affect the tolling issue by persuading the court to adopt a particular reason, and a later state court might have to divine the reasoning behind an unexplained federal dismissal order. In the instant case, for example, dismissal of the supplemental claim clearly would have been warranted under section 1367(c)(3), which authorizes dismissal when the underlying federal claim has

been dismissed, and the district court order of dismissal does not contain any clear statement of reasons.

V. APPLICATION OF SECTION 1367(d) TO A STATE DEFENDANT DOES NOT CONSTITUTE AN ABROGATION OF STATE IMMUNITY

The abrogation issue raised by this case is a narrow one. Respondents apparently do not argue that any federal law which might affect the outcome of an action against a state agency would constitute abrogation of state sovereign immunity. We do not contend that Congress has the plenary authority to rewrite the terms of a state's waiver of sovereign immunity. The issue here is whether the specific impact of section 1367(d) was so grave as to amount to abrogation.

The aspect of Minnesota practice affected by section 1367(d) is tolling. The period of time set out in a statute of limitations is not by itself sufficient to determine if an action is timely. A court must also consider laws, precedents or rules regarding when such a period begins to run, under what circumstances (e.g. incapacity) it is tolled, and what the plaintiff must do (e.g. serve or file the complaint) before the expiration of that period. In this case Congress has not enacted a different time period (e.g. 90 rather than 45 days), but a tolling rule.

In Minnesota equitable tolling is a creature of precedent and inherent judicial authority; no state statute creates or regulates the standard for such tolling. The state Supreme Court below held that whether the limitations period should have been tolled was a matter in the discretion of Hennepin County District Judge Cara Neville. It did not hold that tolling was impermissible under state law, but concluded only that Judge Neville had not abused her discretion in refusing to toll the limitations period in this case. (Pet. App. A14-A15).

A. Application of Minnesota Tolling Practice Is Not A Condition of the State's Waiver of Immunity

Respondents insist that abrogation of a state's sovereign immunity would occur if section 1367(d) overturned a specific condition that was part of a state's waiver statute. (R.Br. 14). But the waiver statute in this case, the Minnesota Human Rights Act, does not itself contain any condition regarding tolling of the 45 day period. The state law does not provide, as a condition of the waiver, that there must not (or should) be equitable tolling in this or any other case. Tolling simply is not mentioned in the statute at all.

The specific conditions expressly imposed in a state waiver statute, and perhaps presumptively entitled to protection by a state's sovereign immunity, must be distinguished from the great body of evolving state law that may affect the outcome of a particular action against the state. When a legislature concludes that some limitation (such as a bar to punitive damages) is of such importance that it should be an express condition of a waiver, it places that restriction in the waiver law itself. But the MHRA did not somehow freeze, and then incorporate by reference as a condition of its enactment, the entire corpus of state procedural, evidentiary and remedial statutes, caselaw and rules as they happened to exist when the MHRA was enacted in 1955.

It makes even less sense to assert that Judge Neville's 1999 denial of tolling was a condition of the 1955 legislation. The Minnesota legislature could not have foreseen how Judge Neville would act 44 years later, or have somehow intended that her later ruling would be a condition of the waiver in the MHRA. Judge Neville's decision rested on the mistaken belief that *Pennhurst II* stripped federal courts of subject matter jurisdiction over any state law claims against a state[11].

[11] Appendix, Brief for Petitioners, p. B 10.

Had Judge Neville exercised her discretion to permit equitable tolling, that would have been equally consistent with the terms of the MHRA, and would undoubtedly have been upheld under the deferential standard of review applied by the state Supreme Court.

B. The Impact of Section 1367(d) Is Too Limited To Constitute An Infringement on State Sovereign Immunity

The states' amicus brief correctly observes that a state's sovereign immunity would be abrogated by a federal law which, by authorizing damage or other actions against a nonconsenting state, threatened its "financial integrity" or interfered with its "autonomy" or "decisionmaking ability." (States Amicus Br. 9, *quoting Alden v. Maine*, 527 U.S. 706, 750 (1999). Thus, the states assert, abrogation would occur if federal law required a state to defend old cases "in which the search for truth may be seriously impaired by the loss of evidence" (States Amicus Br. 11, *quoting United States v. Kubrick*, 444 U.S. 111, 117 (1979)), or lifted a statutory cap on the damages that could be awarded against a state. (States Amicus Br. 12).

That is a fair description of what might constitute the abrogation of a state's immunity; clearly, however, that standard is not met here. Permitting federal litigants to first attempt to bring state claims in federal court, and protecting those efforts with a tolling provision, does not expose a state to any liability that would not exist under state law if the litigant had sued directly in state court. Petitioners cannot, by reason of section 1367(d), collect a single dollar more than they might have won had they in August 1996 sued in Hennepin County District Court rather than federal district court. In the federal proceeding the parties promptly engaged in discovery; there is no claim that the timing of the later state

suit resulted in any loss of evidence. To the contrary, once that suit was filed, the university successfully fought for sixteen months to prevent the state action from going forward. (Pet. Br. 7-8).

In Minnesota, as in most states, only the state legislature has the authority to waive the state's sovereign immunity. Yet the Minnesota Supreme Court concluded in this case that a state trial judge, even without any express statutory authorization, had discretion to toll the 45 day limitation period in the MHRA. If judicial tolling does not (because it could not) constitute a waiver of a state's immunity, the limited tolling provision of section 1367(d) cannot be fairly said to have abrogated that immunity.

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No. 00-1514

In the

Supreme Court of the United States

LANCE RAYGOR AND JAMES GOODCHILD,
Petitioners,

v.

REGENTS OF THE UNIVERSITY OF MINNESOTA,
Respondent.

On Writ of Certiorari
To the Minnesota Supreme Court

BRIEF OF THE STATES OF MARYLAND, ALASKA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, INDIANA, IOWA, LOUISIANA, MASSACHUSETTS, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, TEXAS, UTAH, VERMONT, AND VIRGINIA, AND THE TERRITORY OF GUAM, AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether 28 U.S.C. § 1367(d)—which tolls the statutes of limitations applicable to supplemental State-law claims while those claims are pending in federal court—unconstitutionally infringes on the States' sovereign immunity when imposed on State defendants.

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INTEREST OF THE AMICI CURIAE

The amici States have a specific and a general interest in the resolution of this case. Many plaintiffs include supplemental State-law claims in federal actions brought against States. When those supplemental claims are dismissed without prejudice, the plaintiffs often respond by asserting them in a newly-filed State court action. Whether the limitations periods have expired on those claims will often depend upon whether 28 U.S.C. §1367(d) applies. Accordingly, the outcome of this case will affect the outcome of actions filed against States throughout the country.

The principles governing the disposition of this case have implications that go well beyond the supplemental jurisdiction statute. States have imposed numerous conditions—apart from limitations periods—on the waivers of their sovereign immunity. Some States have placed caps on the amount of damage awards they can be forced to pay; other States have channeled actions against them to specific tribunals which follow specific procedures. The amici States have a strong interest in protecting the conditions placed on their waivers from congressional abrogation.

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case is whether Congress can modify the conditions placed by a State on the waiver of its sovereign immunity. The State of Minnesota imposed restrictions when it agreed to waive its sovereign immunity to employment discrimination claims brought under the Minnesota Human Rights Act (MHRA). One such restriction confines MHRA actions to State, not federal, court. See Minn. Stat.

§363.14, subd. 2 (2000). Another restriction is the statute of limitations, which requires plaintiffs to file their claims in State court within 45 days of receiving notice that the Minnesota Department of Human Rights has dismissed the claims. See Minn. Stat. §363.14, subd. 1(a)(1) (2000). Just as Congress cannot altogether abrogate Minnesota's immunity from State-law claims in State court, it cannot modify the terms of Minnesota's waiver of that immunity. The tolling provision of the supplemental jurisdiction statute, 28 U.S.C. §1367(d), does precisely that. It is therefore unconstitutional as applied to Minnesota in this case, and when imposed on any other State that has waived its immunity conditioned on a specific limitations period.[1]

1. The Constitution prohibits Congress, when acting pursuant to its Article I powers, from abrogating the States' sovereign immunity. States may, however, waive their immunity by consenting to suit. Concomitant with the States' power to waive their immunity is their power to set the conditions and terms by which they can be sued. Those conditions and terms establish the boundaries of the States' waivers; their constitutionally-grounded immunity fully obtains outside those boundaries. A long line of decisions by this Court—addressing the sovereign immunity of both the States and the United States—confirms this principle. It necessarily follows that a federal law purporting to modify the conditions imposed by States

[1] This brief addresses only the question presented in the petition for certiorari. We therefore do not address issues of statutory construction or whether §1367(d) is unconstitutional even when applied to suits among private parties.

on their waivers of immunity is unconstitutional, for it would subject States to suit in a manner or to an extent to which they have not consented.

2. The States have imposed an array of conditions on their waivers of immunity. Among them are limitations on compensatory and punitive damage awards, the use of special tribunals to hear actions, notice-of-claim requirements, and statutes of limitations. These conditions serve the same core interests served by sovereign immunity generally—protecting the public fisc and preserving State autonomy. If Congress were permitted to modify the conditions imposed by States on their waivers, the intrusion on State sovereignty would be as direct and severe as complete abrogation of the States' sovereign immunity.

3. When imposed on non-consenting States, §1367(d) runs afoul of these principles. This Court has held that "[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity." *Block v. North Dakota*, 461 U.S. 273, 287 (1983). Section 1367(d) modifies that condition by extending the limitations period for the many months or years during which a supplemental claim against a State is pending in federal court. The provision is therefore an unconstitutional abrogation when imposed on State defendants.

4. Through the MHRA, the State of Minnesota waived its immunity to private age-discrimination actions brought under State law. That waiver is conditioned on a 45-day limitations period which Congress cannot compel Minnesota to extend. Section

1367(d) may only apply to MHRA actions against the State, therefore, if the State has voluntarily agreed to submit to §1367(d) tolling. In the decision under review, the Minnesota Supreme Court held—as a matter of State law—that the State has not so agreed. Accordingly, §1367(d) may not, consistent with the Constitution, be applied to Petitioners' MHRA claims against the University.

5. Petitioners assert an array of fairness and public policy arguments as to why §1367(d) should apply to their claims. Each of those argument fails on principle, for concerns of fairness and public policy cannot override the States' sovereign immunity. Petitioners' arguments also fail on their own terms. As to fairness, the University did not employ any misleading or improper tactics. Indeed, nothing the University could have done would have prevented the limitations period from expiring during the pendency of Petitioners' federal action. Finally, Petitioners' contention that persons wishing to assert both federal- and State-law claims against States will be unable to do so absent §1367(d) tolling is unfounded. Plaintiffs can assert both types of claims in State court or file separate lawsuits, subject to the inevitable procedural subtleties raised by interrelated dual proceedings.

ARGUMENT

SECTION 1367(d) IS UNCONSTITUTIONAL WHEN IMPOSED ON A STATE—SUCH AS MINNESOTA—THAT HAS CONDITIONED THE WAIVER OF ITS SOVEREIGN IMMUNITY ON A STATUTE OF LIMITATIONS

A. Congress Lacks the Power to Modify the Conditions Pursuant to Which a State Has Waived Its Sovereign Immunity

1. This Court recently confirmed that Congress (except when acting pursuant to §5 of the Fourteenth Amendment) lacks the power to abrogate the States' sovereign immunity. See *Alden v. Maine*, 527 U.S. 706 (1999). Immunity from suit is one of the "attributes of sovereignty" the States possessed upon entering the Union. *Id.* at 729 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934)). As a consequence, "neither the Supremacy Clause nor the enumerated powers of Congress confer authority to abrogate the States' immunity from suit." *Id.* at 733. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court applied that reasoning with respect to private suits arising under federal law brought in federal court. In *Alden*, the Court found that the "logic of the argument . . . applies with even greater force in the context of a suit prosecuted against a sovereign in its own courts, for in this setting, more than any other, sovereign immunity was long established and unquestioned." 527 U.S. at 742. Congressional abrogation of the States' immunity "in their own courts would [therefore] be even more offensive to State

sovereignty than a power to authorize [private] suits in a federal forum." *Id.* at 749. More offensive still would be congressional abrogation of the States' immunity in their own courts with respect to claims arising under State law.

A State may, of course, waive its sovereign immunity by consenting to suit. See *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883). Waiver is not, however, an all-or-nothing proposition. For example, States may consent to suit in their own courts, but not in federal courts. See *Smith v. Reeves*, 178 U.S. 436, 441-45 (1900). More generally, a State "may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted." *Beers v. Arkansas*, 61 U.S. 527, 529 (1857). The States retain their full sovereign immunity outside the limited scope of their waiver: "The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedures." *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53-54 (1944).

The principle that the waiver of sovereign immunity may be conditioned and limited in scope has long governed waivers by the United States. In *United States v. Sherwood*, 312 U.S. 584 (1941), the Court affirmed the United States' right to channel most tort claims against it to the Court of Claims, where jury trials and injunctive relief are unavailable. Stated the Court: "The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's

jurisdiction to entertain the suit." *Id.* at 586 (citations omitted). The Court has reiterated and applied that principle on numerous occasions. See, e.g., *Lane v. Pena*, 518 U.S. 187 (1996) (the United States' waiver of its immunity to claims under §504(a) of the Rehabilitation Act was implicitly conditioned on monetary damages not being available); *Lehman v. Nakshian*, 453 U.S. 156 (1981) (the United States' waiver of its immunity from suit under the Age Discrimination in Employment Act was implicitly conditioned on plaintiffs not having the right to a jury trial). State waivers of sovereign immunity are entitled to no less respectful treatment. See *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506-07 (1998) ("this Court has recognized a correlation between sovereign immunity principles applicable to States and the Federal Government").

Accordingly, any effort by Congress to compel States to defend private actions in a manner or scope different than that set forth in the State legislation waiving the States' immunity would be an unconstitutional abrogation by Congress of the States' immunity—it would subject the States to suit in a manner and to a degree to which the States have not consented, in derogation of the States' constitutionally-grounded immunity. As the Court made clear in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 675-84 (1999), where it rejected the concept of "constructive waivers" of sovereign immunity, Congress cannot dictate the circumstances and manner by which States waive their immunity.

2. Petitioners contend the States' sovereign immunity has a more limited reach, giving States the right to decide only *whether* and *where* they could be sued. Pet. Br. 29, 31. According to Petitioners, the Framers did not "actually ha[ve] in mind" less "serious" issues (*e.g.*, tolling provisions). Pet. Br. 37, 38. Cases such as *Beers* and *Great Northern Life Insurance Company*, however, hold directly to the contrary. Petitioners do not cite those cases, let alone refute their import. It is by now firmly established that the States (and the United States) control the terms and conditions of their waivers of immunity and are entitled to establish the manner in which they may be sued. As to the Framers' thoughts, Petitioners apply an absurdly specific level of generality. The Framers "had in mind" the principle that the States' sovereign immunity would be preserved. That principle does not become inapplicable whenever Congress attempts to abrogate that immunity through legislation addressing issues the Framers had not specifically discussed or contemplated.

Perhaps recognizing this, Petitioners acknowledge that "[a] more substantial constitutional question might arise if the Minnesota legislature, in authorizing actions against the state under the Minnesota Human Rights Act, had expressly provided that that waiver of sovereign immunity was conditioned on a bar to any tolling of the statute of limitations. But the waiver of the state's immunity contains no such specific limitations." Pet. Br. 38-39. Whether Minnesota, in the MHRA, agreed to subject itself to tolling under §1367(d) is a question of State law that is addressed in Section D, *infra*. What matters for present purposes is that Petitioners essentially concede that Congress may

not abrogate a condition placed by a State on the waiver of its immunity.

B. The States Have "Exercised a Privilege of Sovereignty" by Placing a Variety of Conditions Upon the Waivers of Their Immunity

1. In *Alden*, the Court observed that private money damages suits against non-consenting States "may threaten the financial integrity of the States" and impose "substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity of the States." 527 U.S. at 750. These same interests would be threatened were States subjected to private suits in a manner or scope different than that to which they have consented. A closer look at some of the common conditions placed on States' waivers of their immunity confirms that Congress's lack of power to modify those conditions does not represent an extension of *Alden*; it represents a straightforward application of that decision.

A common condition States have imposed on the waiver of their immunity is limiting the amount of compensatory and punitive damages that may be recovered in actions against them.[2] Thus, for example, the maximum monetary recovery a plaintiff can obtain against the State of Missouri for a tort committed by

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[2] See 1 *Civil Actions Against State and Local Government* §6.12, at 489-93 (Shepard's eds., 2d ed. 1992) ("*Civil Actions*") (listing State statutes placing caps on compensatory damage awards against States); §6.10, at 479-83 (listing State statutes barring punitive damage awards against States).

that State is $2,000,000 in compensatory damages and no punitive damages. Mo. Rev. Stat. §537.610(2), (3) (2000). The fiscal impact of a federal statute lifting those limits would be considerable.

Though they have a less direct impact on the State fisc, other conditions on immunity waivers are also grounded in important State interests. For example, some States follow the models of the Federal Tort Claims Act and Tucker Act by channeling tort and contract actions against the State to a State court of claims.[3] And just as the federal Court of Claims adheres to procedures different than those guiding district courts, State courts of claims often follow special procedures designed to accommodate the States' particular interests. In New York, for example, tort claims against the State are heard only in the New York Court of Claims, by a judge not a jury, subject to a six-month statute of limitations, with strict notice-of-claim requirements. N.Y. Ct. Cl. Act §§8, 10-12 (McKinney 1989 & Supp. 2001). Many States that do not use courts of claims also impose strict limitations periods and notice-of-claim requirements on actions brought against the State.[4]

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[3] See 1 *Civil Actions* §§3.7, 3.8, at 196-99 (listing State statutes channeling tort actions against States to courts of claims or special tribunals); James E. Pfander, *An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State-Court Judgments After Seminole Tribe*, 46 UCLA L. Rev. 161, 205 n.166 (1998) (listing State statutes assigning contract claims against States to courts of claims).

[4] 1 *Civil Actions* §5.1, at 334-37 (listing State statutes imposing notice-of-claim requirements on tort claims against States); §6.4, at 456-59 (listing State statutes imposing limitations periods on tort claims against States).

These conditions on waivers serve a variety of policy objectives. Requiring that claims against the State be heard by a judge, rather than a jury, expedites trials and reflects the concern that "juries 'might tend to be overly generous because of the virtually unlimited ability of the Government to pay the verdict.'" *Nakshian*, 453 U.S. at 161 n.8 (quoting H.R. Rep. No. 659, 83d Cong., 1st Sess. 3 (1953)). Limitations periods provide repose and "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence." *United States v. Kubrick*, 444 U.S. 111, 117 (1979). Finally, notice-of-claim provisions "ensure that public officials will receive prompt notice of wrongful conditions or practices, and thus enable[ ] them to take prompt corrective action." *Felder v. Casey*, 487 U.S. 131, 157 (1988) (O'Connor, J., dissenting). These provisions also "enable[ ] officials to investigate claims in a timely fashion, thereby making it easier to ascertain the facts accurately and to settle meritorious claims without litigation." *Id.*

Were Congress permitted to undo these conditions on the States' waivers of their immunity, the nature of the intrusion on the States' sovereign interests would be precisely the same as if Congress altogether abrogated the States' immunity. In *Alden*, this Court observed that, "[t]o the extent Maine has chosen to consent to certain classes of suits while maintaining its immunity from others, it has done no more than exercise a privilege of sovereignty concomitant to its constitutional immunity from suit." 527 U.S. at 758. Virtually every State has "exercise[d] a privilege of sovereignty" by only partially waiving its immunity to suits in its own courts. To the extent the States have

retained their immunity by conditioning their waivers, they are entitled to the same protection from congressional intrusion that Maine received in *Alden*.

2. Petitioners have questioned (Br. 37) whether every federal statute that in any way "affect[s] the liability" of a State invokes the anti-abrogation rule. Undoubtedly, the answer is no. As this Court recognized in a different context, "[r]eally, universally, relations stop nowhere." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (citation omitted). Some federal statutes may affect a State's liability in too "tenuous, remote, or peripheral" a way, *id.* at 661 (citation omitted), to justify invocation of the rule. This case, however, does not present any difficult questions in that regard. A federal statute that, through its direct operation, modifies one of the conditions discussed above—by, for example, lifting caps on damage awards that can be imposed against States —will always have the requisite directness. As discussed in Section C, *infra*, §1367(d) is just such a provision.

Petitioners also question whether States can condition their waivers of immunity on federal courts applying procedures at variance with the Federal Rules of Civil Procedure or local practice. Pet. Br. 39 & n.50. That is an issue for another day. Section 1367(d) operates by extending the limitations periods of cases filed in State court. It does not dictate how cases in federal court are to proceed.

C. Imposing §1367(d) on a State Defendant Unconstitutionally Abrogates a Condition the State Placed on the Waiver of its Immunity

1. Prior to 1990, federal courts often faced a dilemma after they dismissed a federal claim to which supplemental claims had been appended. On the one hand, state courts were the more appropriate tribunals to hear the supplemental claims. On the other hand, the statute of limitations on filing a state court action often had run during the pendency of the federal action. Dismissing the supplemental claims would mean those claims were lost. Federal courts responded to this situation in varying ways, some holding that it would be an abuse of discretion to dismiss a supplemental claim that would be time-barred in state court, others upholding the discretionary dismissal of such claims. Congress included §1367(d) in the supplemental jurisdiction statute to resolve that complication. See generally Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 Ariz. St. L.J. 849, 982-84 (1992).

Section 1367(d) provides:

> The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

For purposes of this brief, we assume Congress intended the provision to apply to actions against States and to supplemental claims dismissed on jurisdictional (as opposed to discretionary) grounds.

2. This Court has held that "[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity." *United States v. Mottaz*, 476 U.S. 834, 841 (1986) (quoting *Block v. North Dakota*, 461 U.S. at 287). Section 1367(d) modifies that condition by extending limitations periods beyond their stated duration. See *United States v. Beggerly*, 524 U.S. 38, 49 (1998) (referring to "extension of the statutory period" caused by tolling). It is therefore an unconstitutional abrogation when imposed on State defendants. Only when a State consents to subject itself to §1367(d) tolling may that provision apply to suits against States. Whether waiver legislation includes such consent is a question of State law, to be finally construed by the States' highest courts.[5]

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[5] Many States have "saving" statutes that "give[ ] to a plaintiff whose timely action is dismissed for procedural reasons such as improper venue a specified time in which to bring a second action." *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 431-32 & n.9 (1965) (listing 31 State saving statutes). Whether saving statutes apply to dismissed supplemental claims and to suits against States is also a matter of State, not federal, law. Compare *Roettger v. Metropolitan Gov't of Nashville and Davidson County*, 991 S.W.2d 244 (Tenn. 1999) (Tennessee saving statute does not apply to actions against governmental entities), with *Lacasse v. Burns*, 572 A.2d 357 (Conn. 1990) (Connecticut saving statute applies to suits against the State).

Apart from policy arguments (which we address in Section E, *infra*), Petitioners offer only two responses, neither of which has merit. First, Petitioners imply that a State should be deemed to waive its immunity when it does not "object[ ] invariably and at once to the assertion of supplemental claims." Pet. Br. 40. Even assuming this argument has not itself been waived, it fails. This Court recently affirmed that the "'test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.'" *College Savings Bank*, 527 U.S. at 675 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985)). That stringent test is not conceivably met by a State's decision to permit its attorneys to decide on a case-by-case basis whether to assert its immunity.

Second, Petitioners argue incorrectly that §1367(d) does not affect the States because the commencement of a federal action with supplemental claims puts the State on notice of those claims. See Pet. Br. 39-40 & n.51. To the contrary, §1367(d) has the direct effect of extending the time in which States may be haled into State court. As such, the provision modifies a condition placed by States on the waivers of their sovereign immunity. That alone is sufficient to invoke the anti-abrogation rule. Moreover, statutes of limitations accomplish more than ensuring defendants are provided with early notice of claims. If it were otherwise, notice-of-claim provisions would render them unnecessary. Limitations periods ensure that when a State-court action actually commences memories have not faded, witnesses have not disappeared, and the State may timely budget for its liability. Those purposes will not necessarily be served as an outgrowth of a federal action that includes claims

barred by sovereign immunity. Cf. *Hawkins v. Barney*, 30 U.S. 457, 466 (1831) ("It is not to be questioned, that laws, limiting the time of bringing suit, constitute a part of the *lex fori* of every country; they are laws for administering justice; one of the most sacred and important of sovereign rights and duties; and a restriction upon which must materially affect both legislative and judicial independence.").

D. Section 1367(d), as Applied to MHRA Actions Brought Against the State of Minnesota, is an Unconstitutional Abrogation of the State's Sovereign Immunity

It remains to apply the foregoing principles to this case. The MHRA waives the State of Minnesota's sovereign immunity by defining the term "employer" as "a person who has one or more employees," and defining the term "person" to include "the state and its departments, agencies, and political subdivisions." Minn. Stat. §363.01, subd. 17, 28 (2000); see also Pet. App. A-12. One condition of that waiver is a limitations period—the MHRA requires plaintiffs to file their claims in State court within 45 days of receiving notice that the Minnesota Department of Human Rights has dismissed the claims. See Minn. Stat. §363.14, subd. 1(a)(1). The State cannot be compelled, by force of federal law, to toll the limitations period in MHRA actions against the State. This leads to one final question: Has Minnesota voluntarily agreed to subject itself to §1367(d) tolling in MHRA suits where it is the defendant?

This State-law question has already been answered in the negative by the final arbiter of Minnesota State

law, the Minnesota Supreme Court. In the decision under review, the court held that "as defined by state law, the University's exposure to MHRA suit in this case existed only for the 45-day period following [Petitioner's] notification of dismissal of charges by the Department of Human Rights." Pet. App. A-12. Application of §1367(d) would, the court found, "expand the University's liability exposure by extending the time in which the MHRA claims can be filed in state court." *Id.* Had the State consented to §1367(d) tolling, the court could not have reached that conclusion.

The Minnesota Supreme Court's conclusion was perfectly sensible. The clearest way by which a State can agree to subject itself to §1367(d) tolling is by expressly referencing §1367(d) in its waiver legislation. To our knowledge, no State waiver statute—and certainly no Minnesota statute—does so. Alternatively, waiver legislation might expressly provide that the limitations period applicable to the State is subject to all generally-applicable tolling provisions. The MHRA does not do that either. See Pet. Br. 38 (the MHRA "says nothing about tolling one way or the other"). Finally, waiver legislation could be found implicitly to consent to §1367(d) tolling. This Court, however, has long applied the canon of construction that a waiver of immunity "will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane*, 518 U.S. at 192 (United States' immunity); see also *Atascadero State Hospital*, 473 U.S. at 241 (State's immunity). That canon strongly counsels against using implication to "enlarge" the government's consent "beyond what the language requires." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (citations omitted). The Minnesota Supreme Court can hardly be faulted for

declining to find implicit consent to §1367(d) tolling in the MHRA.[6]

E. Petitioners' Policy and Equity Arguments Are Unavailing

1. The real thrust of Petitioners' brief is that barring application of §1367(d) to non-consenting State defendants would be poor public policy and unfair under the facts of this case. Respondent's brief addresses the latter concern in detail. To that discussion we add only our firm belief that the University has not employed sharp tactics or otherwise engaged in the sort of conduct about which Justice Kennedy expressed concern in *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 393-98 (1998) (Kennedy, J., concurring). The University did not assert its Eleventh Amendment and statute-of-limitations defenses only after losing on the merits; the University did not mislead the federal district court or Petitioners by suggesting that it would waive its procedural defenses to any State-court action; and the University did not lull Petitioners into missing the 45-day limitations period. To the contrary, the University asserted its immunity from Petitioners' supplemental claims in its answer and in its first motion to dismiss.

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[6] In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 94-96 (1990), this Court ruled that federal statutes waiving the United States' sovereign immunity will be presumed to permit equitable tolling of limitations periods. That decision, however, involved the federal law question of how to construe federal statutes waiving immunity. State courts construing State waiver statutes are free to follow or ignore the example of *Irwin* (which, in any event, did not involve §1367(d) tolling).

In any event, the State limitations period expired a mere two days after Petitioners filed their complaints.

If (as we believe) Petitioners have lost their State-law claims, the fault lies not with the University, but with their failure to foresee the implications of *Seminole* on §1367(d). Some State courts may conclude that the difficulty in foreseeing the implications of *Seminole* on §1367(d) justifies equitably tolling the applicable limitations period. The Minnesota Supreme Court, however, held that the State district court did not abuse its discretion when it denied equitable tolling in this case (Pet. App. A-14 to -15), and the issue of equitable tolling is not before this Court.

2. Petitioners' public policy arguments reduce to a single proposition: without §1367(d) tolling it will be difficult for plaintiffs to assert both federal and State claims against States. That concern runs headlong into this Court's decision in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), in which the Court held that the Eleventh Amendment bars federal courts from hearing claims against State officials based on State law. The Court recognized that "applying the Eleventh Amendment to pendent claims [may] result[ ] in federal claims being brought in state court, or in bifurcation of claims." *Id.* at 122. The Court dismissed that concern because "such considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State." *Id.* at 123.

Petitioners argue, however, that persons suing States in federal court have no choice but to include supplemental State-law claims in their federal actions and therefore no choice but to rely on §1367(d) tolling.

According to Petitioners, plaintiffs are caught in a bind: if they litigate their federal action first, the federal judgment will preclude relitigation of the related State claims in State court; yet State laws regarding claim splitting and election of remedies preclude plaintiffs from maintaining (at the same time) a federal action raising federal claims and a State action raising related State claims. Pet. Br. 13-17, 45-46. This argument—which amounts to the contention that *Pennhurst* is unworkable without §1367(d) tolling—fails on several levels.

First, and most obviously, when the Court issued its decision in *Pennhurst*, Congress was still six years away from enacting §1367(d). Denying tolling under §1367(d) to persons suing States in no way undermines the expectations of the *Pennhurst* Court. The provision (were it constitutional as applied to State defendants) might lessen the practical difficulties facing some persons suing States. But that is simply another policy consideration that, as *Pennhurst* made clear, cannot override the Eleventh Amendment.

Second, private plaintiffs have a simple solution to the dilemma posed by Petitioners: asserting their federal and State claims in one State-court action. The Court in *Pennhurst* specifically adverted to that option (465 U.S. at 122) and later explained: "That a litigant's choice of forum is reduced 'has long been understood to be a part of the tension inherent in our system of federalism.'" *Id.* at 123 (quoting *Employees v. Missouri Dep't of Public Health and Welfare*, 411 U.S. 279, 298 (1973) (Marshall, J., concurring in result)).

Third, Petitioners have overstated the procedural obstacles to bringing separate federal and State

proceedings against a State arising from the same alleged conduct. Ordinary rules regarding claim preclusion, claim splitting, and election of remedies may bar plaintiffs from bifurcating actions brought against other private entities. It is far from clear, however, that those rules would apply when States are the defendants. Only a small percentage of the decisions cited by Petitioners involved claims against States, only three of them even mentioned the Eleventh Amendment, and all but two merely applied ordinary principles of claim preclusion.[7] Petitioners have failed to show that most plaintiffs suing States will be unable to assert federal claims in federal court and, at the same time, assert State claims in State court. At most, they have shown that commentators were correct in predicting that bifurcated proceedings would pose interesting questions regarding the preclusive effect of the action that "comes to judgment first." Paul M. Bator *et al.*, *Hart and Wechsler's The Federal Courts and The Federal System* 1202 (3rd ed. 1988); see also 18 Charles Alan Wright *et al.*, *Federal Practice and Procedure* §4412, at 127 (Supp. 2001) (stating that, because of the Eleventh Amendment's

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[7] Footnote 14 of Petitioners' Brief (at p. 15) lists seven decisions in cases against State agencies, which are repeated in Appendix A to Petitioners' Brief. A handful of additional cases listed in Appendix A involved actions against State defendants. The three State cases listed in Appendix A that mentioned the Eleventh Amendment are *Hall v. State*, 756 P.2d 1048 (Haw. Ct. App. 1988), and the two Iowa cases. The two State cases in Appendix A that did not merely apply ordinary principles of claim preclusion are *Weaver v. Hood*, 577 So. 2d 440 (Ala. 1991), and *Blazer Corp. v. New Jersey Sports and Exposition Auth.*, 488 A.2d 1025 (N.J. Super. Ct. App. Div. 1985), both of which applied anti-claim splitting doctrines.

limitation on federal court jurisdiction, a federal action against a State might not have claim preclusive effect on a subsequent State court action).

Indeed, another of Petitioners' public policy arguments contradicts their assertion that plaintiffs are unable to bifurcate their claims. Petitioners contend that the federal supplemental jurisdiction scheme benefits States by giving them the option of waiving (or postponing the assertion of) their sovereign immunity defense to supplemental State law claims. States may prefer that option, suggests Petitioners, "to avoid the expense and inconvenience of having to try the federal and state claims in separate proceedings." Pet. Br. 33; see also Pet. Br. 12 (States can choose to "litigate the state and federal claims in separate actions"); Pet Br. 37 (States may agree to federal jurisdiction of State law claims "to avoid duplicative trials"). It is difficult to square that contention with Petitioners' assertion that State rules bar the splitting of actions even in cases brought against States.

In the end, we do not disagree with Petitioners that, prior to 1990, federal district courts had no easy way of addressing the situation where an underlying federal claim was dismissed, a pendent State-law claim was not yet resolved, but the State statute of limitations had run since the commencement of the federal action. Nor do we disagree that §1367(d) represents a well-intentioned effort by Congress to replace the "varied and imperfect judicial solutions" (Pet. Br. 22) that had been adopted by federal courts. The issue here, however, is whether the Constitution permits §1367(d) to be applied to actions brought against non-consenting States. It does not. The

concerns of convenience Congress sought to address cannot overcome the States' sovereign immunity.

CONCLUSION

For the foregoing reasons, the judgment of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

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FOR ARGUMENT
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No. 00-1514

OCT 8 2001

IN THE

Supreme Court of the United States

LANCE RAYGOR AND JAMES GOODCHILD,
Petitioners,

v.

REGENTS OF THE UNIVERSITY OF MINNESOTA,
Respondent.

On Writ of Certiorari to the Minnesota Supreme Court

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether 28 U.S.C. § 1367(d), which requires state courts to entertain state law claims that are barred by the State's statutes of limitations, is constitutional.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state and local governments.

One of the core attributes of state sovereignty is a State's power to organize a court system in accordance with its own policies and to prescribe the rules for litigation. A State's authority to regulate the workload of its courts is a fundamental component of this sovereignty. Statutes of limitation and tolling rules are one of the principal means by which a State controls the workload of its courts and prioritizes the enforcement of state-created rights.

The statute at issue in this case, 28 U.S.C. § 1367(d), requires state courts to entertain state law claims that the State's limitations laws prohibit them from hearing. This congressional commandeering of the state courts violates structural principles of federalism and is beyond the power of Congress. Because section 1367(d) is a serious and insupportable encroachment on a core component of state sovereignty, *amici* submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

"Statutes of limitations are not simply technicalities" but are "fundamental to a well-ordered judicial system." *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). Minnesota, like all States, has enacted a comprehensive set of statutes governing the timeliness of state-created causes of action

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

litigated in the State's courts. The Constitution does not confer upon Congress the power to override those time limits in the manner attempted in 28 U.S.C. § 1367(d). The judgment of the Minnesota Supreme Court should accordingly be affirmed.

A. Article III does not grant power to Congress or the federal courts either to superintend the rules of procedure followed in state courts adjudicating state law claims or to override the substantive state law applicable to such claims. As this Court has recognized many times, the state courts derive their authority from state constitutions and the laws adopted thereunder. "The state courts are not, in any sense of the word, *inferior* courts, except in the particular cases in which an appeal lies from their judgment to this [C]ourt." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 97 (1807) (Marshall, C.J.).

It has long been settled that state courts are creations of separate and independent sovereigns. This fundamental constitutional premise precludes any assertion by Congress of Article III power to regulate procedure in the state courts. As this Court explained in *Tarble's Case*, 80 U.S. (13 Wall.) 397, 407 (1871), "[i]n their laws, and mode of enforcement, neither [sovereign] is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other."

The Constitution thus does not grant Congress general supervisory authority over the States in the formulation either of their common or statutory law or their rules of court procedure. It follows that section 1367(d) as applied to the facts of this case is not a valid exercise of Congress' power.

B. Numerous authorities support the conclusion that section 1367(d) exceeds Congress's powers. By its plain terms section 1367(d) displaces state tolling laws and policies in any case in which the State does not, by its own laws, give tolling effect to a prior filing of the state law claim in federal court. While Congress has adopted certain laws tolling state statutes of limitations in extraordinary situations, each was enacted under either the war power or the commerce power and thus provides no support for section 1367(d).

Unlike these other tolling provisions, section 1367(d) was enacted pursuant to Congress's Article III powers in order to aid the jurisdiction of the federal courts. *See* American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 453-54 (1968) (quoted in Pet. Br. 24-25). The notion that Article III authorizes Congress to so grossly intrude upon the sovereign powers of the States to create rights and prescribe the procedures for enforcing them in their own courts is the product of a one-sided view of the federal-state balance and violates the fundamental structural principles of the Constitution.

Whether a State's statutes of limitations are deemed to be procedural (as they are for conflicts of laws purposes and the Full Faith and Credit Clause) or substantive (as under the *Erie* doctrine) is irrelevant. In either event, this Court's cases hold that the power to prescribe the time within which state-law claims shall be filed in the State's courts is a fundamental and historic attribute of the States' sovereignty that Congress cannot override pursuant to its Article III powers.

For example, in *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457, 466 (1831), the Court held that "[i]t is not to be questioned, that laws limiting the time of bringing suit, constitute a part of the lex fori . . . they are laws for administering justice; one of the most sacred and important of sovereign rights and duties." The Court has thus recognized the power of a State to control access to its courts by applying

its own statutes of limitations "even when the substance of the claim must be governed by another State's law." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988).

Similarly, the *Erie* line of cases, which addresses the substantive law to be applied when a state claim is adjudicated in federal court, establishes limits on the Article III power that preclude the application of section 1367(d)'s tolling provision in this case. As the Court recognized in *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 112 (1945), "[w]henever [a State's limitations] law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court."

The Court has recently reaffirmed that Congress may not require state legislative or executive branches to enact or administer federal regulatory programs. *See Alden v. Maine*, 527 U.S. 706 (1999). The authority to set their own agendas for legislative and executive action is one of the core components of the sovereignty retained by the States under the Constitution.

The courts are one of the principal institutions through which the State's legislative and enforcement priorities are carried out. Statutes of limitation are an important means by which a State controls the workload of its courts and prioritizes the enforcement of state-created rights. Protecting this core aspect of state sovereignty from federal interference is essential to the preservation of politically accountable government.

Nor is there any merit to petitioners' contention that Minnesota's non-tolling policy retaliates against federal litigants for seeking redress in the federal courts. This Court has upheld the use of state tolling rules even when their application has resulted in the dismissal of suits brought under the federal civil rights laws. If federal courts routinely

borrow state statutes of limitation even when the result is the dismissal of a federal claim, a state court does not engage in impermissible discrimination when it applies a forum-neutral tolling rule to a state-created right litigated in state court. In the absence of such discrimination, section 1367(d) is neither a necessary or proper exercise of Congress' Article III powers.

ARGUMENT

SECTION 1367(d) IS AN UNCONSTITUTIONAL ENCROACHMENT ON STATE AUTHORITY

The Court has long recognized that "the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every [government], in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction." *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 327 (1839). Thus, for nearly two centuries it has been established that " '[t]he period sufficient to constitute a bar to the litigation of stale demands, is a question of municipal policy and regulation, and one which belongs to the discretion of every government, consulting its own interest and convenience.'" *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988) (quoting 2 James Kent, *Commentaries on American Law* 462-63 (2d ed. 1832)).

The Court has accordingly explained that "[s]tatutes of limitations are not simply technicalities" but are "fundamental to a well-ordered judicial system." *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). Moreover, "[i]n virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975).

Like all States, Minnesota has enacted a comprehensive set of statutes governing the timeliness of state-created

causes of action. *See* Minn. Stat. ch. 541; *see also id.* § 363.14(1)(a)(1). Minnesota, however, has not enacted a "savings" or "renewal statute," and thus a claim brought in a court that lacks jurisdiction does not toll the State's statute of limitations. *See Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 431-32 & n.9 (1965); *see generally* Minn. Stat. ch. 541; *Bonhiver v. Graff*, 248 N.W.2d 291, 300 (Minn. 1976). This rule applies whether a suit is brought in the courts of another State, a foreign State, or the United States.

Petitioners seek to override this important state policy by invoking 28 U.S.C. § 1367(d) to toll their state-created claim because they brought it first in federal court. As explained below, section 1367(d) cannot be applied to save supplemental state law claims filed in federal court when the federal court lacks jurisdiction over the federal claim. While applying section 1367(d) in this case unconstitutionally intrudes on Minnesota's sovereign immunity,[2] the statute suffers from a far more fundamental constitutional flaw. The Constitution does not grant Congress the broad power to superintend either the substantive rules of state law or the rules of procedure in the state courts. Indeed, whenever section 1367(d) is applied to require a state court to adjudicate a state law claim that would otherwise be barred because the State has not enacted a savings statute, that application violates structural principles of federalism by denying the State the authority to create and administer its own laws. The judgment of the Minnesota Supreme Court dismissing petitioners' case should therefore be affirmed.

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[2] *Amici* fully agree with respondent's arguments that section 1367(d) violates the State's constitutionally protected sovereign immunity. *See* Brief of Respondent Regents of University of Minnesota, Sec. I.

A. The Constitution Does Not Grant Congress Supervisory Authority Over The Tolling Rules Applicable To State-Created Causes of Action Litigated In State Courts

1. "[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). "Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.' " *Printz v. United States*, 521 U.S. 898, 918-19 (1997) (quoting The Federalist No. 39, at 245 (J. Madison)).

The Constitution's preservation to the States of a core of sovereignty is manifested in several ways. It is displayed implicitly by the grant to Congress of the limited, enumerated powers found in Article I, Section 8. *See Printz*, 521 U.S. at 919; *see also Gregory*, 501 U.S. at 457 (1991) ("The Constitution created a Federal Government of limited powers."); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). It is made express by the text of the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." As James Madison wrote:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, at 296 (J. Madison) (Isaac Kramnick ed., 1987).

Where the Constitution does grant power to the federal government, that power is limited in a critical respect vis-à-vis the States. As the Court observed in *New York v. United States*, 505 U.S. 144, 166 (1992), "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *See also Printz*, 521 U.S. at 919-20 ("the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people").

As the Court has explained:

> The great innovation of this design was that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other"—"a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."

Printz, 521 U.S. at 920 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). As Madison wrote: "[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." The Federalist No. 39, at 258 (Isaac Kramnick ed., 1987).

The structure of the Constitution "thus contemplates that a State's government will represent and remain accountable to its own citizens." *Printz*, 521 U.S. at 920. This division of authority has many benefits, including enhancing citizen participation in the political process, "allow[ing] for more innovation and experimentation in government," *Gregory*, 501 U.S. at 458, and "secur[ing] to citizens the liberties that

derive from the diffusion of sovereign power." *New York*, 505 U.S. at 181 (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

2. Article I, Section 8, of the Constitution sets forth Congress' powers. While clause 17 confers on Congress the power "[t]o exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia, and "to exercise like Authority over all Places purchased . . . for the Erection of" military and other installations, thus granting Congress police power over these areas, U.S. Const. Art. I, § 8, cl.17, the Constitution otherwise "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *United States v. Lopez*, 514 U.S. 549, 566 (1995) (citing Art. I, § 8); *see also United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000) ("[T]he principle that the Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States, is deeply ingrained in our constitutional history.") (internal quotations and citations omitted).

The Court has further held that Congress has implied "power to make all laws necessary and proper for carrying into execution not only all the powers previously specified, but also all other powers vested by the Constitution in the government of the United States, or in any department . . . thereof." *Tennessee v. Davis*, 100 U.S. (10 Otto) 257, 263 (1880). The Court, however, has recently reaffirmed that " '[w]hen a "La[w] . . . for carrying into Execution" the [enumerated powers] violates the principle of state sovereignty reflected in the various constitutional provisions . . . it is not a "La[w] . . . *proper* for carrying into Execution the [enumerated powers]," and is thus . . . "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such."' " *Alden v. Maine*, 527 U.S. 706, 732-33 (1999) (quoting *Printz*, 521 U.S. at 923-24 (quoting The Federalist No. 33, at 204 (Hamilton) (C. Rossiter ed., 1961))).

The scope of Congress's authority with respect to the federal judicial power is similarly constrained. Under Article III, Congress indisputably has power to "ordain and establish" federal courts inferior to this Court. U.S. Const. Art. III, § 1. This includes the power to regulate the jurisdiction of, and the procedure to be followed in, the federal courts. *See Sibbach v. Wilson*, 312 U.S. 1, 655 (1941); *Livingston v. Story*, 34 U.S. (9 Pet.) 632, 656 (1835).

Article III does not, however, grant power to Congress or the federal courts either to superintend the rules of procedure in the state courts or to rewrite the substantive rules with respect to state-created causes of action. A long line of authority rejects the notion "that Congress could confer jurisdiction upon the State courts." *Claflin v. Houseman*, 93 U.S. (3 Otto) 130, 141 (1876); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 27 (1820) (opinion of Washington, J.) ("I hold it to be perfectly clear, that Congress cannot confer jurisdiction upon any Courts, but such as exist under the constitution and laws of the United States. . . ."); *id.* at 67 (Story, J., dissenting) ("There is no pretence to say, that Congress can compel a State Court Martial to convene and sit in judgment on [a federal criminal] offense."). *See also* 1 James Kent, *Commentaries on American Law* 377 (New York, O. Halstead 1826) ("The doctrine seems to be admitted, that congress cannot compel a state court to entertain jurisdiction in any case.").

While a state court is required to enforce a federal cause of action where its jurisdiction is "adequate and appropriate," this obligation does not derive from a congressional conferral of jurisdiction but from the Supremacy Clause. *Testa v. Katt*, 330 U.S. 386, 394 (1947); *see also* The Federalist No. 82, at 459 (Hamilton) (Isaac Kramnick ed., 1987). The Court has expressly rejected the contention that state courts adjudicating a federal claim "become courts of the United States, exercising a jurisdiction conferred by Congress."

Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 222 (1916). In *Bombolis*, the Court explained that its holdings that a state court with adequate jurisdiction must enforce a federal claim "in no sense implied that the duty which was declared to exist on the part of the state court depended upon the conception that for the purpose of enforcing the right the state court was to be treated as a Federal Court deriving its authority not from the State creating it, but from the United States." *Id.*

The Court recognized in *Bombolis* that the state courts derive their authority from state constitutions and state law. As Chief Justice Marshall explained almost two hundred years ago: "[t]he state courts are not, in any sense of the word, *inferior* courts, except in the particular cases in which an appeal lies from their judgment to this [C]ourt. . . . They are not inferior courts because they emanate from a different authority, and are the creatures of a distinct government." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 97 (1807); *see also* The Federalist No. 82, at 459 (in taking cognizance of cases arising under federal statutes, state courts would exercise "the judiciary power" of their own government).

As Congress's authority to regulate the procedure in the federal courts is derived from its powers to create inferior federal courts and regulate their jurisdiction, its lack of power to confer jurisdiction on the state courts and the long-settled understanding that the state courts are creations of separate and independent sovereigns preclude any assertion of Congressional power under Article III to regulate procedure in state courts. The state and federal governments are of "distinct and independent character . . . within their respective spheres of action." *Tarble's Case*, 80 U.S. (13 Wall.) 397, 407 (1871). "Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its

judicial officers with the action of the other." *Id.* at 406. As the Court further explained:

> In their laws, and mode of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other.

Id. at 407-08.

Thus, in *Mondou v. New York, N.H. & Hart. Ry. Co.*, 223 U.S. 1 (1912), which preceded *Testa* in holding that state courts with adequate jurisdiction must enforce a federal cause of action, the Court was careful "to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, *or to control or affect their modes of procedure*." *Id.* at 56 (emphasis added). The Court further explained that the case involved "only [the] question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure." *Id.* at 56-57. Moreover, in *Testa*, the Court noted the respondent's concession "that this same type of claim arising under Rhode Island law would be enforced by that State's courts" and that "[i]ts courts have enforced claims for double damages growing out of the Fair Labor Standards Act." 330 U.S. at 394.

To be sure, subsequent cases establish that state courts must apply a federal rule of procedure that is "part and parcel" of a federal cause of action. *See Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 363 (1952) (internal quotation and citation omitted). Furthermore,

"where state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.'" *Felder v. Casey*, 487 U.S. 131, 138 (1988) (quoting *Brown v. Western R.R. Co. of Ala.*, 338 U.S. 294, 296 (1949)).

As the *Felder* Court recognized, however, "[*n*]*o one disputes the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts.*" 487 U.S. at 138 (emphasis added). *See also Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931) ("the procedure by which [state-created] rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control").

Procedural rules, of course, constitute the *lex fori*. And because "they are laws for administering justice," which is "one of the most sacred and important of sovereign rights and duties[,] . . . a restriction" on a State's authority to control them would "materially affect both legislative and judicial independence." *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457, 466 (1831); *cf. M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) at 327 (noting "the now well understood rights of nations to organize their judicial tribunals according to their notions of policy"). Unless a State's sovereignty over its judicial process is no more than an empty shell, the rules of procedure which a State adopts for administering its own laws cannot be revised by Congress in an exercise of Article III power.

Consistent with this understanding, the Court has long recognized that the federal judicial power is of limited scope. In *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Court repudiated *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), recognizing the "fallacy underlying" its rule that federal courts "need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by its highest court" and "are free to exercise an independent judgment as to what

the common law of the state is . . . ." 304 U.S. at 71, 79. *Erie*'s declared basis of decision was the Constitution's limitations on federal power:

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. *Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts.* And no clause in the Constitution purports to confer such a power upon the federal courts.

304 U.S. at 78 (emphasis added). As Justice Field earlier wrote, "the constitution of the United States . . . recognizes and preserves the autonomy and independence of the states" in both "their legislative and . . . judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States." *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting) (quoted in *Erie*, 304 U.S. at 78-79).[3]

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[3] Congress also has power under Section 5 of the Fourteenth Amendment to enforce the due process clause "by appropriate legislation." *See* U.S. Const. Amend XIV, § 5. The due process clause, however, is not implicated by a State's refusal to toll the limitations period applicable to a state claim when a plaintiff chooses to pursue it in the courts of another sovereign. Petitioners could have pursued both their state and federal claims in the state courts, which were open to them for the length of the Minnesota Human Right Act's relevant limitations periods. *See* Minn. Stat. § 363.06(3) (one year limitation period for claims brought as a civil action directly in state district court); *id.* § 363.14(1)(a)(1) (where person pursues administrative remedy, a civil action may be brought within 45 days of receiving commissioner's determination "that there is no probable cause").

As the foregoing demonstrates, the Constitution does not grant Congress a general supervisory authority over the state courts in the formulation of either common law or rules of procedure. That, as petitioners feebly argue, a congressional regulation of state court procedures seems like a "sensible and balanced solution to [a] problem," Pet. Br. 24, does not make it constitutional.[4] As explained below, section 1367(d) as applied in this case is not a valid exercise of Congressional power.

B. Section 1367(d) Exceeds Congress' Powers Under The Constitution

Section 1367(d) was enacted in 1990 as part of Congress' codification of the doctrines of pendent claim, pendent party, and ancillary jurisdiction into the doctrine of supplemental jurisdiction. *See* Charles A. Wright, *Law of Federal Courts* § 9, at 33-34 (5th ed. 1994). Section 1367(d) provides:

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[4] In *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), the Court expressly rejected the argument that "considerations of judicial economy, convenience, and fairness to litigants . . . counsel against a result that may cause litigants to split causes of action between state and federal courts." *Id.* at 121 (internal quotations and citations omitted). As the Court explained, "[i]t may be that applying the Eleventh Amendment to pendent claims results in federal claims being brought in state court, or in bifurcation of claims. That is not uncommon in this area." *Id.* at 122. Furthermore, "such considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State." *Id.* at 123.

At a minimum, this Court's decision in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (Mar. 27, 1996), called into question whether a federal court could exercise jurisdiction over an ADEA claim against a state entity. Petitioners received right-to-sue letters in June and July 1996. Pet. Br. 3. Prudence thus suggested that petitioners file their state and federal claims in both state and federal courts, and move to stay the state court action pending the resolution of any challenge to federal court jurisdiction.

> The period of limitations for any claim asserted under [1367(a) supplemental jurisdiction], and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

Judicial Improvements Act of 1990, § 310(a), Pub. L. No. 101-650, 104 Stat. 5089, 5114 (1990) (codified at 28 U.S.C. § 1367(d)). The provision seems to have received little attention in Congress other than the cursory statement buried in a House Report that its "purpose is to prevent the loss of claims to statutes of limitations where state law might fail to toll the running of the period of limitations while a supplemental claim was pending in federal court. It also eliminates a possible disincentive [sic] from such a gap in tolling when a plaintiff might wish to seek voluntary dismissal of other claims in order to pursue an entire matter in state court when a federal court dismisses a supplemental claim." H.R. Rep. No. 101-734, at 30 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6876.

By its plain terms, section 1367(d) displaces state tolling laws and policies whenever a State does not give tolling effect to the filing of a suit in a court without jurisdiction—so long, of course, as a plaintiff files first in federal court. The statute cannot be sustained as an exercise of either Congress's express powers under Article I or its implied powers under Article III. Moreover, because the statute violates the Constitution's structural principles of federalism, it cannot be sustained under the necessary and proper clause.[5]

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[5] Congress apparently modeled section 1367(d) after a proposal made by the American Law Institute. *See* Brian A. Beckcom, Note, *Pushing the Limits of Judicial Power: Tolling State Statutes of Limitations Under 28 U.S.C. § 1367(d)*, 77 Tex. L. Rev. 1049, 1058 (1999); *see also* The American Law Institute, *Study Of The Division Of Jurisdiction Between State And Federal Courts* § 1386(b) (1969).

The ALI proposal states that:

> If any claim in an action timely commenced in a federal court is dismissed for lack of jurisdiction over the subject matter of the claim, a new action on the same claim brought in another court shall not be barred by a statute of limitations that would not have barred the original action had it been commenced in that court, if such new action is brought in a proper court, federal or State, within thirty days after dismissal of the original claim has become final or within such longer period as may be available under applicable State law.

Study of the Division of Jurisdiction § 1386(b), at 65. At least one ALI member expressed the dissenting view that it was unconstitutional for Congress to tell a state court, "You have got to hear and decide this case, just because the plaintiff unfortunately but wrongly started in the wrong court . . . no matter what your own supreme court and your own legislature tell you." Beckcom, 77 Tex. L. Rev. at 1061 n.89 (quoting ALI, Proceedings, 41st Annual Meeting 192-205 (1964)).

1. Throughout the nation's history, Congress has adopted several laws tolling state statutes of limitations. *See* An Act In Relation To The Limitation Of Actions In Certain Cases, 13 Stat. 123 (1864); Transportation Act of 1920, § 206(f), 41 Stat. 462; 50 U.S.C. App. § 8(c) (Trading with the Enemy Act); 50 U.S.C. App. § 525 (Soldiers And Sailors' Civil Relief Act Of 1940). Each of these statutes, however, was enacted in response to such national emergencies as the Civil War and First and Second World Wars. Article I explicitly grants Congress the power "[t]o declare [w]ar," "raise and support [a]rmies," "provide and maintain a [n]avy," "make [r]ules for the [g]overnment and [r]egulation of the land and naval [f]orces," and "provide for calling forth the [m]ilitia to execute the [l]aws of the Union, suppress [i]nsurrections and repel [i]nvasions." U.S. Const. Art. I, § 8, cls. 11-15.

As the Court observed in a challenge to the tolling provision enacted during the Civil War,

> The measures to be taken in carrying on war and to suppress insurrection are not defined. . . . [T]he power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power . . . to remedy the evils which have arisen from [the conflict's] rise and progress. This act falls within the latter category. The power to pass it is necessarily implied from the powers to make war and suppress insurrections.

Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 506-07 (1871). Likewise, the tolling provision of the Soldiers and Sailors' Civil Relief Act, 50 U.S.C. App. § 525, which remains in effect, is fully within Congress' powers to provide for the armed forces and their governance. *See* U.S. Const. Art I, § 8, cls.12-14.[6] The existence of these extraordinary provisions thus provides no support for the enactment of section 1367(d), which is not an exercise of the foregoing Article I powers.[7]

2. Petitioners adopt the ALI's view that section 1367(d) is a valid exercise of Congress's powers under Article III. *See* Pet. Br. 24-26. Petitioners quote the ALI's conclusory assertion–predicated on the assumption that a federal forum is invariably preferable to a state forum—that "[i]t is plainly appropriate, as an aid to the exercise of federal jurisdiction, to see to it that a plaintiff is not discouraged from seeking a

[6] While the tolling provision of the Transportation Act of 1920 was not enacted until after the conclusion of World War I, that provision addressed the effect to be given to the federal government's control of the railroads during wartime and was upheld as "a war measure." *Wenatchee Produce Co. v. Great Northern Ry. Co.*, 271 F. 784, 784 (E.D. Wash. 1921).

[7] Petitioners cite the Y2K Act's provision which tolled state statutes of limitations during the prescribed "notice and remediation period." *See* Pet. Br. 26 n. 36 (quoting 15 U.S.C. § 6606(e)(4)). Congress enacted this provision pursuant to its Article I commerce power. *See* 15 U.S.C. § 6601(b).

federal forum if he believes such a forum is available. One way to achieve this goal is to assure him that he will not lose his cause of action if his belief turns out to be erroneous." *Id.* at 24-25 (quoting ALI, *Study of The Division Of Jurisdiction*, 453-54).

This one-sided view of Congress's authority to legislate "in aid of the [federal] judicial power," ALI Study at 455, violates the fundamental structural principles of the Constitution. Whether a State's statutes of limitations are deemed to be procedural (as they are for purposes of conflicts of laws principles and the Full Faith and Credit Clause) or substantive (as they are under *Erie*) is irrelevant. Both lines of authority establish the core proposition that with respect to state-created causes of action, the power to "prescrib[e] the time within which suits shall be litigated in their Courts" is a fundamental and historic attribute of the States' sovereignty that Congress cannot override in an exercise of Article III power. *M'Elmoyle*, 38 U.S. (13 Pet.) at 327.

In *Hawkins* the Court observed that "[i]t is not to be questioned, that laws limiting the time of bringing suit, constitute a part of the lex fori of every country: they are laws for administering justice; one of the most sacred and important of sovereign rights and duties; and a restriction which must materially affect both legislative and judicial independence." 30 U.S. (5 Pet.) at 466. And in *M'Elmoyle* the Court explained that:

> It would be strange, if in the now well understood rights of nations to organize their judicial tribunals according to notions of policy, it should be conceded to them in every other respect than that of prescribing the time within which suits shall be litigated in their Courts. Prescription is a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of the

> sovereignty by which it exercises its legislation for all persons and property within its jurisdiction.

38 U.S. (13 Pet.) at 327.

Thus for nearly two centuries it has been established that "'[t]he period sufficient to constitute a bar to the litigation of stale demands, is a question of municipal policy and regulation, and one which belongs to the discretion of every government, consulting its own interest and convenience.'" *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988) (quoting 2 James Kent, *Commentaries on American Law* 462-63 (2d ed. 1832)). Consistent with these principles, the Court has long recognized the power of a State to control access to its judicial forums by applying its own statutes of limitations, "even when the substance of the claim must be governed by another State's law." *Sun Oil*, 486 U.S. at 723. Accordingly, under the Full Faith and Credit Clause, a forum State has the right to apply its own statute of limitations to bar an action even if the State where the cause of action arose would allow it. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 517 (1953) (citing *Restatement of Conflict of Laws* § 603 (1934)).

This rule is supported by the recognition that a State's authority to control the agenda in its courts is a fundamental attribute of its sovereignty. As the *Sun Oil* Court explained: "[a] State's interest in regulating the work load of its courts . . . certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations." 486 U.S. at 730. While the Full Faith and Credit Clause only addresses State-to-State relations, *Tarble's Case* makes clear that as between the state and federal sovereigns, the "mode of enforcement" that either a federal or state sovereign adopts for its "respective laws" is a "matter[] subject to [its] own control, and in the regulation of which neither can interfere with the other." 80 U.S. (13 Wall.) at 407-08.

3. While the *Erie* line of cases has the specific purpose of determining what law must be applied when a state claim is adjudicated in federal court, it nonetheless manifests limits on the federal judicial power which prohibit the application of section 1367(d) to petitioners' state law claims in this case. As the Court recognized in *Erie*, "Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." 304 U.S. at 78.[8]

The Court's cases applying the *Erie* doctrine conclusively establish that the federal courts must apply state statutes of limitations and tolling rules to a state law claim. The Court's cases likewise establish that Congress's implied powers under Article III to regulate the procedure in the federal courts do not include the sweeping power to displace state statutes of limitations and tolling rules which apply in the State's own courts.

In *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 108-09 (1945), the Court stated that "since a federal court adjudicating a state-created right . . . is . . . in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State." Because "a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly," the Court held that "if a plea of the statute of limitations would bar recovery in a State court, a federal court ought not

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[8] The *Erie* rule that "the law to be applied in any [diversity] case is the law of the state," 304 U.S. at 78, applies as well to state claims brought in federal court under supplemental jurisdiction. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

to afford recovery." 326 U.S. at 110. The Court further explained that:

> The source of substantive rights enforced by a federal court under diversity jurisdiction . . . is the law of the States. *Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court and whether the remedies be sought at law or may be had in equity.*

Id. at 112 (emphasis added).

The issue of tolling is, of course, "closely related" to "the length of the limitations period." *Wilson v. Garcia*, 471 U.S. 261, 269 (1985). Following *Guaranty Trust*, the Court held that *Erie* requires that a federal court apply state tolling rules to a state tort claim. *See Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530, 533-34 (1949). The issue in *Ragan* was whether a federal court suit had been commenced within Kansas's statute of limitations. *See id.* at 531-32. The petitioner argued that he had tolled the statute of limitations by filing his complaint in the federal district court within the prescribed time, *see* Fed. R. Civ. P. 3, even though service was not properly effected until several months after the expiration of the limitations period. *See* 337 U.S. at 531. Under Kansas law, however, "the requirement of service of summons within the statutory period was an integral part of [the] statute of limitations." *Id.* at 532.

The Court held that the suit was barred. While acknowledging that "the suit was properly commenced in the federal court" under the federal rules, the Court reasoned that because the "cause of action is created by local law, the measure of it is to be found only in local law . . . . It accrues and comes to an end when local law so declares." *Id.* at 533. A federal court, the Court explained, "cannot give [a state cause of action] longer life in the federal court than it would

have had in the state court without adding something to the cause of action. We may not do that consistently with *Erie*." *Id.* at 533-34.

Thirty years later the Court expressly re-affirmed *Ragan*'s holding that a federal court must apply state tolling rules in a lawsuit based on a state cause of action. *See Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). The Court rejected the argument that *Hanna v. Plumer*, 380 U.S. 460 (1965), had overturned *Ragan* and thus required that Fed. R. Civ. P. 3 be applied to displace Oklahoma's statutory requirement that actual service was required to toll the statute of limitations. *See* 446 U.S. at 749-51. The Court explained that "[t]here is no indication that the Rule was intended to toll a state statute of limitations, much less that it purported to displace state tolling rules for purposes of state statutes of limitations." *Id.* at 750-51. "In contrast," Oklahoma's statute "is a statement of a substantive decision by that State that actual service on, and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations." *Id.* at 751. The Court held that because there was "no direct conflict between the Federal Rule and the state law, the *Hanna* analysis does not apply." *Id.* at 752.

Hanna held that a federal rule of civil procedure prevails in a direct conflict with relevant state law. But the federal rules of civil procedure apply only to proceedings brought "in the United States district courts." Fed. R. Civ. P. 1. *Hanna* further recognized that "*neither Congress nor the federal courts* can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution [as] in such areas state law must govern because there can be no other law." 380 U.S. at 471-72 (emphasis added).

Thus, while "the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause)

carries with it congressional power to make rules governing the practice and pleading *in those courts*," *id.* at 472 (emphasis added), and to "prescribe housekeeping rules *for federal courts* even though some of those rules will inevitably differ from comparable state rules," *id.* at 473 (emphasis added), *Hanna* does not support the conclusion that section 1367(d) is a valid exercise of Congress's Article III powers.[9] Indeed, *Hanna* does no more than recognize the traditional principle of conflicts that the forum is entitled to apply its own rules of procedure even when the substance of a claim is governed by another sovereign's law.

Section 1367(d) is not simply a rule of federal court procedure. While section 1367(d) tolls a state law claim during its pendency in the federal district court, its goes much further. By its plain terms it tolls a state law claim "for a period of 30 days after it is dismissed" by a federal court. It does so for the purpose of allowing plaintiffs who improperly bring suit in federal court to refile their claims in state court. *See* H.R. Rep. No. 101-734, at 30, 1990 U.S.C.C.A.N. at 6876. Section 1367(d) thus governs "the practice and pleading in" state courts. *Hanna*, 380 U.S. at 472. It is therefore an unconstitutional attempt to set the agenda of the state courts by overriding state statutes of limitations and tolling rules.

4. As explained above, state courts are required to hear federal claims where they have "adequate and appropriate" jurisdiction over analogous state claims. *See Testa v. Katt*, 330 U.S. 386, 394 (1947). Moreover, a state court adjudicating a federal claim is required to apply federal procedures that are part of the federal scheme. *See Felder*, 487 U.S. at 153. But the *Felder* Court also recognized that

[9] *Hanna* also applies to Congressional enactments governing procedure in the federal courts. *See Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 26-27 (1988).

"[n]o one disputes the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts." 487 U.S. at 138. *See also Sun Oil*, 486 U.S. at 722 ("Since the procedural rules of its courts are surely matters on which a State is competent to legislate, it follows that a State may apply its own procedural rules to actions litigated in its courts."); *Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931) ("the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control").

The Court has recently held that "Congress may not require the legislative or executive branches of the States to enact or administer federal regulatory programs." *Alden v. Maine*, 527 U.S. at 752; *see also Printz*, 521 U.S. at 935; *New York v. United States*, 505 U.S. at 188. The authority to set their own agendas for legislative and executive action is one of the core components of the residual sovereignty the States retain under the constitutional scheme. *See Printz*, 521 U.S. at 925-33; *New York*, 505 U.S. at 166-69. The retention of this authority—free from federal interference—is essential to the preservation of political accountability.[10]

[10] Petitioners' analogies to various ancient practices of England's courts are misplaced. *See* Pet. Br. 26-27 & nn. 37-38. In England, both the law and equity courts derived their power from the same source of sovereign authority—the king and parliament. The same holds true with respect to "inferior courts" and the courts of King's Bench. 1 William Blackstone, *Commentaries On The Laws Of England* 266 (George Sharswood ed. 1904) (the king "has alone the right of erecting courts of judicature" and "all jurisdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers").

The courts of Minnesota, however, are not "inferior" courts. As Chief Justice Marshall explained, "The state courts are not, in any sense of the word, *inferior* courts, except in the particular cases in which an appeal lies from their judgment to this court." *Ex parte Bollman*, 8 U.S. (4 Cranch)

The courts are one of the principal institutions through which the State's legislative and enforcement priorities are carried out. Statutes of limitations are one of the chief means by which a State controls the workload of its courts and prioritizes the enforcement of state-created rights. *See Sun Oil*, 486 U.S. at 730 ("A State's interest in regulating the workload of its courts . . . certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations.").

Disregarding the centuries-old recognition that "'[t]he period sufficient to constitute a bar to the litigation of stale demands, is a question of municipal policy and regulation, and one which belongs to the discretion of every government, consulting its own interest and convenience,'" *Sun Oil*, 486 U.S. at 726 (quoting *Kent's Commentaries*, at 462-63), Congress has taken the extreme step of ordering Minnesota's courts to entertain state law claims which its own legislature has barred them from hearing. Beyond this clear usurpation of Minnesota's sovereignty, such federal commandeering of state judicial resources has untoward consequences. In response, the State might be prompted to expend more money on judges, courtrooms, and other personnel. Or the State might do nothing, allowing the quality and speed of state court adjudication to decline. In either case, it is state officials rather than members of Congress who will be blamed for the increase in costs or the decrease in efficiency. Section 1367(d) thus violates the accountability principles of *Printz* and *New York*.

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at 97. Rather, they are courts of a co-sovereign, "'no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" *Alden*, 527 U.S. at 714 (quoting The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison)); *see also Ex parte Bollman*, 8 U.S. (4 Cranch) at 97 (state courts "are not inferior \courts because they emanate from a different authority, and are creatures of a distinct government").

As the foregoing demonstrates, the States' authority to set the agenda for their own courts is a historic and fundamental attribute of their sovereignty. To be sure, the States ceded a portion of this authority in the Constitution, but only to the extent that the Supremacy Clause prohibits state courts from refusing to hear a claim because of its federal source. *See Testa*, 330 U.S. at 394. Minnesota's non-tolling policy does not implicate this principle, where the source of the right is the State's own laws.

5. Petitioners further argue that Minnesota's non-tolling policy is functionally equivalent to "retaliation against federal litigants because they sought redress in federal court." Pet. Br. 25. According to petitioners, "[t]he refusal of state law . . . to toll a state limitations period while the plaintiff seeks to enforce that state right in federal court, although not the result of any improper motive, will have the same punitive impact as an intentional act of retaliation." *Id.* at 26.

Petitioners, however, can make no showing that Minnesota's non-tolling policy discriminates against litigants who file in federal court. Rather, the State's policy is a neutral rule which applies whether a litigant pursues a claim in the courts of another State, a foreign State, or the United States. Thus, to the extent there is a non-discrimination principle that applies to a state court litigant who previously sought redress in a federal forum, petitioners have not established that Minnesota's courts have discriminated against them because they exercised a federal right.[11]

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[11] Applying section 1367(d) to override a State's non-tolling policy would violate one of the fundamental principles of the *Erie* doctrine, *i.e.*, that "it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in federal court." *Hanna*, 380 U.S. at 467. If a plaintiff sues a Minnesota defendant in the courts of another State and suffers dismissal for lack of jurisdiction, Minnesota's non-tolling policy would bar the plaintiff from refiling the action in Minnesota's courts. But if the plaintiff had sued in federal court and

Indeed, contrary to petitioners' suggestion, federal causes of action routinely borrow state statutes of limitations and tolling rules even when such rules disfavor plaintiffs. It "is commonplace in federal statutory law" that Congress does "not establish a statute of limitations or a body of tolling rules applicable to actions brought in federal court." *Tomanio*, 446 U.S. at 483. "When such a void occurs, this Court has repeatedly 'borrowed' the state law of limitations governing an analogous cause of action." *Id.* at 483-84 & n.3 (collecting cases). The Court has further held that "this 'borrowing' logically include[s] rules of tolling[.]" *Id.* at 485; *see also Johnson v. Railway Express Agency*, 421 U.S. at 463-64; *Wilson*, 471 U.S. at 269 (in § 1983 actions "the length of the limitations period, and closely related questions of tolling and application, are to be governed by state law") (footnote omitted).

Most significantly, the Court has upheld the use of state tolling rules even when their application results in the dismissal of suits brought under federal civil rights statutes such as 42 U.S.C. § 1981 & § 1983. *See Tomanio*, 446 U.S. at 492 (holding § 1983 action barred where State "has expressed by statute its disfavor of tolling its statute of limitations for one action while an independent action is being pursued"); *Johnson*, 421 U.S. at 462-67 (applying state statute of limitation and tolling rule to bar action brought under 42 U.S.C. § 1981). If federal causes of action routinely borrow state statutes of limitations and tolling rules even when doing so will result in the dismissal of a federal civil rights claim, than surely a state court does not engage in improper discrimination when it applies a forum-neutral tolling rule to a right created by the State. In the absence of

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suffered dismissal, section 1367(d) would allow the plaintiff another thirty days to refile in Minnesota's courts. Section 1367(d) would thus lead to a materially different result because a case was filed in federal rather than state court.

such discrimination, section 1367(d) is neither a necessary or proper exercise of Congress's Article III powers or any other provision of the Constitution.

CONCLUSION

The judgment of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

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